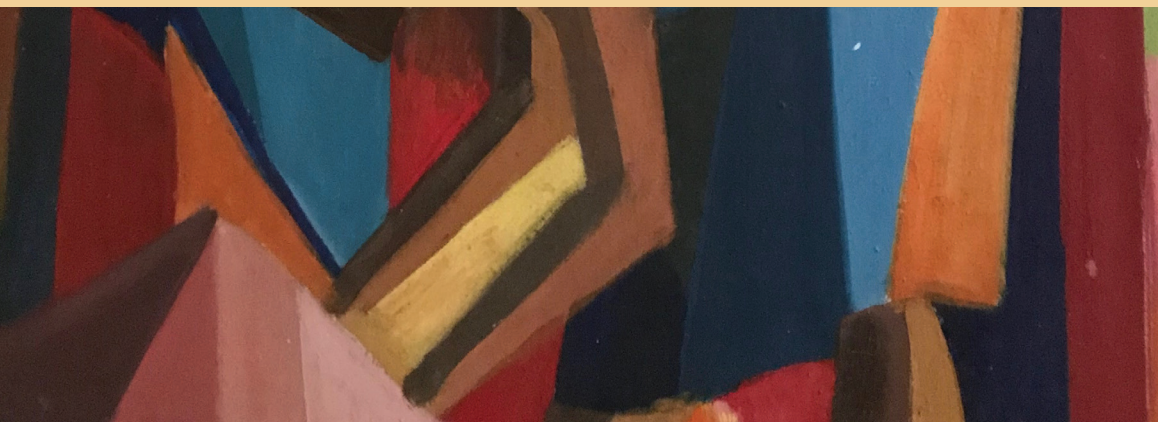




**SOCIAL and LEGAL THEORY in
the AGE of DECOLONIALITY:
(Re-)Envisioning Pan-African
Jurisprudence in the 21st Century**

EDITED BY

Artwell Nhemachena, Tapiwa V. Warikandwa
& Samuel K. Amoo



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*Tapiwa V. Warikandwa, Artwell Nhemachena &
Samuel K. Amoo*

Foreword

Historically, Africa is known to have had great ideas that saw the continent teaching Western scholars such as Plato, Isocrates [who studied philosophy and medicine in ancient Africa], Pythagoras [who is known to have spent 22 years learning in Africa], Orpheus and Musaeus, Melampus, Daedalos, Homer, Lycurgus, Solon, Eudoxos, Democritus, Thales and Oenopides. Apart from having great systems of education which attracted Western scholars, Africa had great ancient libraries such as the Alexandrian library which was established in about 235 BC in the ancient Egyptian capital of Alexandria. In spite of these great historical African achievements, Western scholars have subsequently arrogantly tended to regard Africans as blank *tabula rasa* and the continent as empty *terra nullius* and without property laws or jurisprudence of its own. In all this, Western systems of education have not only facilitated the erasure of African ideas, epistemologies, ontologies, including African philosophy, social and legal theories as well as African jurisprudence; Western systems of education have also created crops of African scholars who take prodigious pleasure in uncritically parroting the West, even to the point of wittingly or unwittingly celebrating colonial disinheritance of Africa. In other words, Eurocentric epistemologies have created some mimetic African scholars and practitioners who have no African epistemic and ontological essence. The curse of erasure, which Africa has suffered during centuries of (neo-)colonisation, has been used by Westerners to perpetuate the myth that Africa has never had its own education systems, its own great theorists, philosophers and jurists. In this way the great African jurisprudence, social and legal theories, which account for the great reception and treatment which Westerners got when they first visited Africa, have been conveniently erased by Westerners seeking to foreground their own agendas on the continent.

With African jurisprudence, social and legal theory erased, Westerners have for centuries foisted Eurocentric jurisprudence, social and legal theories in Africa. Thus, the jurisprudence that the Westerners currently call African jurisprudence is in fact Eurocentric

jurisprudence foisted in an African continent that has suffered erasure of [real] African jurisprudence. Living on Eurocentric jurisprudence, Africa cannot escape from the resilient [invisible, juristic] global (neo-)imperial designs that feature in the form of dictates of imperial rule of law often in contexts where (neo-)empire itself shies away from accountability to imperial juridical systems alias international courts. Thus whereas shrewd ancient Africans would have known that just, moral, ethical and sound systems of law needed to be founded on existing African cultural systems, today laws including human rights are sadly celebrated the more when they are seen to pulverise essential African cultural foundations. Yet, if it is African culture [including ethics, mores, justice and laws] that distinguishes human beings from animals, celebrating the pulverisation of [African] culture logically amounts to unwittingly celebrating processes of being animalised in the cloak of Eurocentric human rights.

In other words, Africa has not only suffered colonisation in terms of imposition of Western social, legal theory and jurisprudence—Africa has also suffered theft of ideas of great African pundits in the same way the Westerners destroyed the ancient great Alexandrian library. With all this plunder of African jurisprudence, Westerners have not wasted their time in summarily labelling Africans as barbaric, in spite of the historic existence of great juristic and philosophical ideas on the continent. Today Africa is erroneously deemed to have had no ideas of jurisprudence including human rights in spite of the humane treatment that Africans gave to those that subsequently colonised and enslaved them. Consequently, Africans are so erroneously presumed to lack civility that it is deemed ineluctable for the continent to import “civility” from the former colonisers, in spite of the glaring barbarism of (neo-)colonisation and (neo-)enslavement. Today, Africans are erroneously deemed to possess no ideas of ownership of property such that Africans’ properties and resources are still owned by Westerners who consider their jurisprudence to be the only one that spell out ownership rights to property. Similarly, in spite of the historical wealth of ideas about philosophy, society, mathematics, technology, architecture, jurisprudence and so on, Africa is erroneously deemed to have never

had ideas and logics about constitutionalism, government and politics.

This book re-envisions jurisprudence, social and legal theory from Pan-African and Afrocentric vantage points. In other words, the book seeks to revisit, rewrite and re-present African jurisprudence, social and legal theory by taking full cognisance of African history, cultures, ethics, law, morality, philosophies and so on in an effort to go beyond jurisprudential mimicry of the West. In other words, the book seeks to rethink African jurisprudence by first stepping outside the ‘belly of the empire’ in order to begin thinking outside it and provide Pan-African and Afrocentric jurisprudential insights that will help Africa redefine its own trajectory in the 21st century. In short, the paradox of Africa is that it currently follows the laws and jurisprudence of those that have looted, exploited and robbed the Africans since the enslavement era. In this respect, the laws and jurisprudence of looters and robbers can only sadly legitimise further (neo-)colonial plunder of Africa. The contemporary debates about decoloniality need to take on board the great ancient African histories of great epistemologies, ideas, jurisprudence, political constitutions and great African systems of government, great African systems of property ownership and great ancient African ideas about human rights emanating from the humaneness with which Westerners were treated when they first travelled to Africa. In this regard, this book critically interrogates contemporary approaches and theories including posthumanism, transhumanism, relational ontologies, animism, earth jurisprudence, ecocentrism, ecosexuality and postanthropocentrism in so far as they relate to jurisprudence and social theory. The book is also informed by contemporary discourses on futurology, studies of anticipation and studies of expectations about what the future of Africa might be in the light of contemporary developments in science and technology, and the emergent New World Order. In other words, the book is situated in contemporary pronouncements about the emergence of what other scholars like Aldous Huxley (2006) call the “Brave New World” in the “Brave New World Order” with a domineering One World Government”. In this sense, the book also interrogates the Brave New World in which humans will be

genetically bred, technologically modified, socially indoctrinated and pharmaceutically anesthetised to passively uphold an emergent worldwide authoritarian Euro-American ruling order. This book therefore delves into what can be called **anticipatory jurisprudence** – it is not only the past and the present that need to be decolonised, rather, extant also are imperatives to decolonise the jurisprudence of the future.

Artwell Nhemachena, Tapiwa V. Warikandwa & Samuel K. Amoo

Identity, Originality and Hybridity in Jurisprudence and Social Theory: An Introduction

*Artwell Nhemachena, Tapiwa V. Warikandwa &
Samuel K. Amoo*

Africans must scrutinize the kind of education they are acquiring in schools to find out why they are not yielding the desired results; it is rather making them polished slaves who can neither invent nor create to fulfill their needs. They must learn to appoint for themselves visionary and creative leaders, not incompetent leaders and puppets who champion the cause of neo-colonialists and mind enslavement of their own people ... (Onyeakor, 2012).

The land question has become internationalised, not least because it suggests the incomplete decolonisation processes in ex-settler colonies, but also the international management of the Zimbabwe land problem has highlighted various longstanding north-south grievances (Moyo, 2003: 1).

The word restitution is itself not preferred much in our land. As a country, South Africa's concept of choice is reconciliation... Until now reconciliation appears to have been thoroughly abducted into the discourse of the ruling classes in South Africa. From this perspective reconciliation appears to be something which the powerless must do for the powerful; it seems to be a necessity for the wronged and an optional extra for the beneficiaries and perpetrators; reconciliation comes across as some ritual to be performed by the poor; a rite for Blacks and a right for Whites; something women should consider more seriously than men... Legally speaking, for restitution to occur, the White man would be required to restore or return the land of the African... Restitution starts with an admission of personal, historical and communal guilt... Charity and corporate social responsibility are often about the giver and the investor, intending them to feel good about themselves and intending to make others feel good about the investors and the givers... But restitution focuses our attention on the injured; whether the injured are the women in our country, the Blacks among us, the "foreigners" within our borders... (Maluleke, 2008: 684 – 688).

Introduction

While decolonisation has been conceptualised, by some scholars, in terms of moving away from state policies of control over indigenous people and in terms of “decolonising African bodies” to restore senses of sacred interconnection, restoring embodied spiritual practice, in terms of relationality between human beings and the environment (Bradley *et al*, 2005; Young *et al*, 2005), we argue for the need to conceptualise it in terms of deimperialisation. Invoking the end of empire, resistance to Eurocentricism, righting wrongs of colonial domination, enhancing self-determination, social justice and human rights of enslaved indigenous people (Mackinlay *et al*, n.d.), decolonisation and decoloniality also ought to be understood in relation to histories of (neo-)colonial dispossession, looting, theft and exploitation of indigenous people. In this sense, the contentious issue is whether Africans need to be decolonised from their own states or they need to be decolonised from (neo-)imperial forces that are as antithetical to African states as they are to African bodies, as implied in the discourses on decolonisation of bodies, more generally.

The recent strident Euro-American opposition to the indigenous Zimbabweans’ reclamation or repossession of their (neo-)colonially looted land is indicative of broader global paradoxes not only because reclamations or repossessions of land would ordinarily assist in furthering the African Ubuntu-informed human rights [including the restoration of the dignity of the colonially dispossessed indigenous people] but also because decoloniality and decolonisation are currently the in thing in this 21st century. Instead of acknowledging the (neo-)colonial looting of African land, Eurocentric thinkers choose to use the Ubuntuless Eurocentric ideologies of human rights and democracy to enrol some [hoodwinked] Africans to the defence of the (neo-)colonial status quo. The fact that Eurocentric human rights and democracy have been on the continent of Africa for long without necessarily entailing restitution, restoration and compensation to (neo-)colonially dispossessed Africans underscores that the human rights and democracy are mere Euro-American ideological apparatuses in the Marxist sense (Althusser, 2008). The contention here is that while Marxist scholars write about ideological

and repressive state apparatuses, we consider it imperative to also cognise the Euro-American [global] ideological and repressive apparatuses that explain the resilient (neo-)colonial plunder and consequent stagnation of the African continent. Put in another way, the problem for Africans since the colonial era has never been simply one of Marxist ideological and repressive state apparatuses. Since colonial states were in fact imperial states, it would be simplistic for scholars to focus on ideological and repressive state apparatuses when analysing African societies and sociological jurisprudence. In other words, African states have not necessarily originated from Euro-American Westphalian states – rather, some states in Africa have been (neo-)colonially articulated with (neo-)imperial states, with jurisprudential consequences. The lesson here is that deconstructionist scholars should distinguish between a question of origin and a problem of mere articulation between African states and imperial states – the two need not be collapsed together.

Drawing a line between questions of origin and problems of articulation between the colonisers and the colonised enables scholars not to simplistically assume that Euro-American colonisation of Africa was constructive or enriching to the continent. While some scholars assume that precolonial Africans did not have states and that African states originated from Westphalianism (Nhemachena, 2017), we contend that African states preceded colonisation and that what colonialists simply did was to articulate African states with the (neo-)imperial system of states. In this regard, Euro-Americans did not construct African states as is presumed by social constructivist or social constructionist theories which are the basis of contemporary poststructuralist theorising (Andrews, 2012; Berger *et al*, 1991; Marques, 2017) – rather Euro-America simply articulated the pre-existing African states with their own (neo-)imperial states. At the points of articulation there have been processes of destruction, imperial cannibalism of the African others, erasure of what was African, theft, robbery, looting, dispossession and exploitation of the Africans - all of these aspects are not theorised by the [social] constructivist or [social] constructionist theories which Eurocentric scholars are popularising, particularly since the 1960s. It is unfortunately on the basis of constructivist or constructionist

theories that (neo-)imperial states like France have forced their Franco-phone African states to sign colonisation pacts wherein the Franco-phone African states are forced to compensate France for the supposed benefits deemed to derive from French colonisation (Nhemachena *et al*, 2017a; Tchouteu *et al*, 2017; Francis, 2016). Whereas the underlying assumption of the colonisation pacts is that colonisation was constructive and hence beneficial, to the contrary, a number of scholars have shown that (neo-)colonialism has been essentially about looting, robbery, theft, plunder, destruction, disrupting and distorting of whatever is African (Fanon, 1963; Rodney, 1973; Smith *et al*, 2017; Mhango, 2018). We argue against Eurocentric erroneous suppositions that (neo-)colonialism is about the development of Africa, the construction and growth of Africa. The evidence that Africa has not developed in spite of centuries of (neo-)colonisation refutes the logics underlying contemporary claims by colonialists and their descendants who demand compensations for supposedly developing Africa. In fact Africa is being (neo-)colonially underdeveloped, plundered and exploited as is evident in the contemporary 21st century transnational corporations' land grabs wherein African peasants are being dispossessed – supposedly for green developmental projects, without notice and without compensation (Nhemachena *et al*, 2017b).

While white farmers, who were evicted from farms during the Zimbabwean repossession of land, demand and are accorded compensation (News24, 27 January 2018), on the other hand African peasants who are being dispossessed and displaced by transnational corporations - involved in the 21st century land grabs - are denied compensation, restitution and restoration; often they are not even given notices or consulted prior to dispossession and displacement (Nhemachena *et al*, 2017b). It is easy to draw parallels between the white farmers' demands for compensation and the French colonial pacts since in both cases it is ironically assumed that Africa has been developed because of the (neo-)colonisation, dispossession, looting and exploitation. While the evictee white farmers demand compensation for supposedly improving African land, France also demands compensation for supposedly developing Africa during the enslavement and (neo-)colonial eras. Noting ways in which (neo-

)colonialists robbed, looted and stole land, livestock, knowledge and so on from indigenous Africans who have not been compensated up to now, we call for a Pan-African jurisprudence that lays to rest resilient (neo-)colonial assumptions of *re nullius* and *terra nullius* that are at the centre of contemporary colonial pacts and demands for compensation by evictee (neo-)colonialists. We also recognise the need to decolonise jurisprudence and social theories such as social constructivism which presuppose that (neo-)colonialists constructed or invented Africa when in fact they destroyed it, stole, robbed and exploited indigenous Africans. We thus call upon African scholars to dislodge the Eurocentric constructivist theoretical hocus focus that is unfortunately sitting on African stilts. Also underscored in this chapter is the fact that the (neo-)colonisation of Africa has nothing to do with constructions and inventions but everything to do with theft, plunder, destruction and robbery. The chapter urges African scholars to notice that colonialists did not come to Africa to [philanthropically] invent or to construct anything but to steal, rob, loot, destroy and dispossess the Africans. By focusing on the (neo-)imperial plunder, robbery, destruction and dispossession of indigenous Africans, African scholars and jurists will then be able to sift and expose some false versions of decolonisation or false versions of decoloniality that do not seek to rectify the colonial looting, dispossession, robbery and destruction but to perpetuate the (neo-)colonial status quo wherein Africans do not get restitution, compensation and restoration for what was plundered from them during the (neo-)colonial era.

The point here is that by foregrounding theories on the supposed constructivism and constructionism, Eurocentric scholars and thinkers hide the (neo-)colonial looting, robbery, plunder and destruction that is at the core of (neo-)imperial centuries-old criminality in Africa. If (neo-)empire is seen for the criminality it perpetrates on Africa, this exposes the fallacy of constructivism that is peddled through some Eurocentric theories – a criminal cannot be deemed to be constructive which is why criminals are tried in the courts. Therefore, theories about social constructivism and social constructionism hide the [social] destruction and plunder that is the reality of (neo-)colonialism – Africa was not constructed or invented

by (neo-)colonialist, rather African was plundered, disrupted, looted and destroyed. The argument here is for the need for a Pan-Africanist jurisprudence that takes note of the destruction, plunder, robbery and looting. A Eurocentric jurisprudence that is premised on [social] constructionist theories pays short shrift attention to the realities of (neo-)colonialism for the majority of Africans who are dispossessed, robbed and exploited, including by Euro-American states and transnational corporations that paradoxically claim to champion human rights and democratic agendas in the world (Nhemachena *et al*, 2017a; Bond, 2006; Nhemachena *et al*, 2017b). In this sense, a Eurocentric jurisprudence that claims that (neo-)colonialists improved and developed the looted African land conveniently ignores the (neo-)colonial destruction including genocide on African (neo-)colonial victims, the dispossession and robbery of Africans who were also exploited as cheap labour for the supposed and alleged improvements and developments.

Whereas Eurocentric jurisprudence would explain (neo-)colonialism in terms of constructivism and constructionism, Pan-African jurisprudence would explain (neo-)colonialism in terms of the criminality of erasure, destruction, disruption, destabilisation, exploitation and plunder of African originality. While Eurocentrism explains (neo-)colonialism in terms of gains, Pan-African jurisprudence would explain the (neo-)colonialism in terms of losses including losses of original African ownership, possession, innovation, loss of African identities, loss of African autonomy and sovereignty, loss of African dignity, loss of African jurisprudence and integrity to African institutions more broadly. In this regard, whereas Eurocentrism would describe (neo-)colonialism in terms of modernity and modernisation, Pan-African jurisprudence would describe (neo-)colonialism in terms of the barbarism associated with theft, genocide, robbery, rape, looting, destruction and the conjurations of planetary witchcraft and sorcery. In a context where Eurocentrism and (neo-)colonialism entailed the destruction of what is African, to portray them in terms of constructivism and constructionism would be to ignore the destruction and theft that are immanent in the descriptor (neo-)colonisation. In as far as Africa is concerned, Eurocentrism and (neo-)colonisation connote and denote

perversions, erasure, theft, looting, robbery and destruction. While Eurocentrism has been assumed to merely and simplistically refer to something as of European origin, we contend in this chapter that, because Euro-America has looted, stolen and robbed Africa for centuries, whatever is in Euro-America is not necessarily originally Euro-American. In this regard, Eurocentrism refers not simplistically to something as originally European but to theft, robbery and lootings that are associated with the perversions of the (neo-)colonial and (neo-)enslavement eras. The point here is that (neo-)colonisation of other people does not imply abundance of originality and innovativeness on the part of the (neo-)colonisers, on the contrary, it implies lack of more ethical originality and innovation – otherwise if they were as original and innovative in their European nations it would not have been necessary for them to colonise other people, including Africans. To rob, steal and loot from other people, as was the case with (neo-)colonisers, underscores absence of morality, ethics, originality and innovation in the home countries of the (neo-)colonisers. In short, an innovative, original and enterprising person would not survive by looting, robbing, stealing and colonising others – rather, robbing and looting from other people is symptomatic of absence of innovative thinking and originality. The (neo-)imperialists colonised other people because the colonialists lacked innovative and original thinking to resolve their problems within the borders of their nation states – to rob others is not necessarily to be innovative and original. Put in another way, (neo-)colonisers did not come to Africa because they were innovative and original or had capacity – they came to rob, steal and loot from Africans precisely because of lack of innovativeness, originality and capacity within their (neo-)imperial nation states and continents. One does not colonise the other person because one has ethical, moral or legal capacity, originality and innovativeness – rather it is precisely because of lack of these aspects that robbery, theft and (neo-)colonisation happen, particularly on such a grand scale as was the case with (neo-)imperialism. In other words, whereas theories on [social] constructionism would postulate that (neo-)colonialism constructed nature, culture, humanism, order, political institutions, legal institutions and so on, the reality on the African continent is that African institutions were in fact destroyed –

(neo-)colonisation is a destructive process and not a constructive one.

In this regard, we argue that there have so far been serious equivocations within which on one hand Pan-Africanists and Afrocentrists refer to Eurocentrism to mean (neo-)colonial looting, robbery and theft whereas Eurocentrists would want to understand Eurocentrism to suggest completely the opposite – that is to suggest that Euro-Americans brought about institutions including nation states, health institutions, education institutions, family institutions, legal institutions, heterosexual marriage institutions, economic institutions and so forth. Thus, there are serious misunderstandings – when the dispossessed, robbed, exploited Africans [whose precolonial institutions were (neo-)colonially destroyed] use the term Eurocentrism, they should be understood as referring to the robbery, theft, exploitation and destruction originating from (neo-)colonisers. To decolonise jurisprudence, it is imperative to cognise the robbery, theft and destruction wrought by (neo-)colonialists. The point is that when Afrocentrists and Pan-Africanists mention Eurocentrism, they do not necessarily imply that Europeans originated knowledge, ideas, notions and practices of ownership of property, jurisprudence, law, politics, society, heterosexual marriage, family, education, culture and so on. Rather, at the intersections between Europe and Africa, Eurocentrism connotes and denotes massive theft, destruction, looting, murder, robbery and the subsequent effacement of originary identities of the (neo-)colonised.

Understood in terms of the criminality of massive planetary theft, destruction, robbery and looting of (neo-)colonised and (neo-)enslaved people, Eurocentrism and the attendant coloniality and (neo-)colonisation cannot be corrected by replicating colonial deconstruction and decomposition of African institutions. If (neo-)colonisation is about the destruction, deconstruction, theft, looting, displacement, disruption and replacement of originary African identities, notions, ideas, practices and so on, it logically follows that decolonisation should be about making good the theft, destruction, decomposition, robbery and lootings that are central to (neo-)colonisation. Thus, during the (neo-)colonial era, African Ubuntu-informed humanness, humanism, human rights, originary juristic

ideas and practices were deconstructed, disrupted, displaced and stolen. Similarly, in family law and jurisprudence, in criminal jurisprudence, delict, succession, trade and commercial law, original African ideas have been deconstructed, disrupted, disposed, stolen and replaced with counterfeit Eurocentric ideas and practices. In matters of identity, original African identities are being replaced with Eurocentric ideas that are antithetical to original African identity. In short, the original African human beings are being replaced with “hybrid” beings lacking in African identities and [Ubuntu] comportments.

While some scholars conceptualise decoloniality in terms of the modernity/coloniality approach wherein they argue that modernity/coloniality operate together (Nhemachena, 2016), we differ from them in that we do not conceive Eurocentrism as related to modernity, in the sense of progress and civilisation. We would rather posit a Eurocentrism/coloniality approach in place of the modernity/coloniality approach. In this respect, following African scholars like Olufemi Taiwo (2010), we note that pre-colonial Africa had its own noncolonial modernity which was disrupted and stolen by (neo-)colonialists.

In so far as decolonial jurisprudence is concerned, contemporary discourses about hybridity hide more than they reveal. In a context where indigenous people are anxious to reclaim their original resources, properties and identities, Eurocentrists are popularising discourses of hybridity which deny originality and purity. As a sleight of hand, discourses on hybridity deny the existence of original [purely] African owners of the resources and properties – in other words, African resources are deemed to lack precolonial original owners, original distinctions between African human beings and animals are denied. Similarly precolonial original distinctions between good and evil are denied. While precolonial Africans distinguished between males and females, Euro-American slave drivers and colonisers collapsed the distinctions between men and women such that both of them equally became beasts for Euro-American (neo-)imperial burdens. While in the contemporary era there are Eurocentric pretences about progressiveness of pronouncements of equality between men and women, human beings and animals, nature

and culture, humans and nonhumans, it is imperative to note that even the slaveholding era presumed equality between the enslaved [whether male or female] - all of whom were deemed to be animals or beasts to carry the burdens of the masters. In other words, there is nothing progressive, modern or civilised about Eurocentric assertions of equality among the (neo-)colonised peoples in the world - particularly where there is, paradoxically, no equality between the (neo-)colonisers and the (neo-)colonised or between (neo-)imperial subjects and (neo-)imperial forces. In short, considered to be animals, the enslaved [whether male or female] were deemed equal in that respect of being beasts of burden. It is this same logic of equality that exist between the (neo-)colonised [whether male or female] who continue to equally carry the burdens of (neo-)empire, postcoloniality notwithstanding.

Focusing on what we call 'interstitial jurisprudence' between municipal laws and international laws, we argue that there is no equality between (neo-)imperial subjects in Africa and the Euro-American (neo-)imperial centres that arrogate privileges to craft and enforce international laws and to visit sanctions on peripheral states. While we acknowledge tomes of jurisprudential books and literature on challenges of access to law and justice by impoverished people within particular jurisdictions, we would want to focus also on the interstitial jurisprudence between the (neo-)colonisers and the (neo-)colonised. We contend that it is by focusing on the interstitial jurisprudence between the (neo)colonisers and the (neo-)colonised that we are able to adequately secure the intellectual grit that is imperative for a robust decolonial jurisprudence. We hold that just as there was jurisprudential apartheid during the colonial era, in the contemporary era there is what we call **global jurisprudential apartheid** which explains why Africans and other leaders in the global south are preferred for indictment in the International Criminal Court for example. Thus, much as indigeneity was criminalised during the colonial eras, Africanity, Pan-Africanism and Afrocentricity are criminalised in a global jurisprudential apartheid in which Africans and their leaders are still subject to global regimens of disciplining and sanctioning by the (neo-)imperial powers that always want to eat their cakes and have them. In such a global

jurisprudential apartheid, African leaders find themselves being driven to international courts for indictment in much the same way that African-Americans and Aborigines are preferred for indictments within the resilient colonial systems of contemporary North America and Australia, for example. We argue that it is not because of the imperatives of curtailing impunity that African-Americans and indigenous people disproportionately constitute prison population as well as subjects for police harassment, as underscored in the recent Black Lives Matter movement in America (Lebron, 2017; Keeanga-Yamahtta, 2016) – rather, the underlying issue is one of global jurisprudential apartheid.

Although such global jurisprudential apartheid might be simplistically construed in terms of extravagant criminality and the need to curb the impunity of African Americans, indigenous people and Africans, we argue that the greatest incidences of criminality and impunity are occurring in the (neo-)colonial folds wherein centuries old crimes of (neo-)enslavement, (neo-)colonial genocide and exploitation are still to be addressed - restoration, restitution and compensation are still to be made to (neo-)colonial victims. In other words, decolonial imperatives would urge that the criminality and impunity of (neo-)imperial powers be addressed before the same powers can claim to want to hold their (neo-)colonial African victims to account. The point here is that from a global jurisprudential apartheid perspective, the problem for Africans is not simplistically the supposed international criminality and impunity of their Pan-Africanist leaders and citizens; rather the problem is the criminality and impunity of (neo-)imperial forces that manifest in the form of (neo-)imperial states and transnational corporations which continue to grab, loot and rob African resources and properties. The criminal Western institutions including the World Bank and the International Monetary Fund continue to claim that they are indebted by Africans when in fact it is the same Western institutions and states that owe Africans compensation not only for inducing neoliberal shocks to them but for the criminality of the (neo-)enslavement and (neo-)colonial eras (Nhemachena, 2016).

Although Afrocentrism is demonised by some scholars as assuming the existence of a common African [human] essence

(Adeleke, 2009), we argue that the same applies to Eurocentric claims of global community, international community and so forth – these also assume commonality or an essence, even as African essence is paradoxically being denied. To deny essence, communion and community among Africans – in the families, marriages, localities, states and on the continent- while at the same time assuming the existence of essence for global communities, international communities is in fact ironic. Denied commonality, community and essence at various levels including families, localities, nationality, regionality and continentality and so forth, Africans are divided even as Eurocentrists are ironically claiming the existence of communities and commonalities at global and international levels, where Europeans dominate. In fact, while Euro-American scholars and “civil society organisations” demonise African Queens, Kings and Chiefs as archaic and anachronistic, ironically Europe retains its Queens and Kings even as African ones are ruled out (Nhemachena, 2016). From a global jurisprudential apartheid perspective, we hold that the inconsistencies show the replication of colonial era and apartheid logics wherein African Kingly and Chiefly power was deconstructed and decomposed even as colonial power was being celebrated and fortified. Today, Eurocentric ‘concentration’ and exercise of power is celebrated while paradoxically the power of Africans is being deconstructed and decomposed. While it may be argued that Europe has the money to pay their Kings and Queens, it is necessary to note that effectively European Kings and Queens are paid from transnational corporations’ proceeds from exploiting and dispossessing Africans – it is effectively a case of the *de facto* taxation of Africans without representation (Nhemachena, 2016). Thus, even as Africans are urged to dispense with their Kings, Queens and Chiefs on the Eurocentric pretext that the continent has no money to pay such supposedly antidemocratic, archaic and anachronistic institutions; transnational corporations are busy *de facto* taxing Africans [including via numerous concessions on the continent] of which proceeds are used *inter alia* to pay European Kings and Queens and furnish the splendours of Euro-America (Fanon, 1963; Rodney, 1973). Decolonising jurisprudence requires attention to the global *de facto* taxation of Africans who ironically lack representation in major

global institutions such as the United Nations Security Council, the International Monetary Fund, the World Bank and transnational corporations that pretend to be focused on business when in fact they also usurp African governance and hijack the governments. There are issues of ethics, legality, morality and justice in all these matters which require the attention of sincere decolonial legal scholars, jurists and practitioners – they require retheorisation of jurisprudence in terms of global jurisprudential apartheid that would make it possible to interrogate the global interstices to expose the coloniality which is lodging in them.

Apart from exposing the conundrums of *de facto* global taxation without representation and accountability, the foregoing argument also raises questions about simplistic Eurocentric theorisations of African politics and constitutional jurisprudence in terms of the separation of powers. In contexts where African judiciaries, legislatures and executives are forced to pay homage to (neo-)imperial systems, structures and institutions, there are profound questions about the validity, veracity and sincerity of theories that assume independence and the separation of powers in Africa. In fact, African legislatures and executives are often harassed by the Euro-American funded “civil society organisations” that have become the new missionaries or footsoldiers of their (neo-)imperial funders (Nhemachena and Bankie, 2017; Bankie and Nhemachena, 2017) into enacting, ratifying and incorporating (neo-)imperial laws. In other words, in Africa, *de facto* power does not lie with African leaders, judiciary and legislatures – these only hold *de jure* jurisdictional powers. This effectively means that some formal leaders in Africa are *de facto* ceremonial in the light of the theft of African *de facto* power by transnational corporations, busybody Euro-American states and institutions that have, over the centuries, become addicted to dictating to Africans.

Although some Africans might simplistically think that (neo-)imperial interventions in the form of human rights, humanitarianism, democracy, violence, good governance and so on are liberating and sincerely altruistic, it is necessary to note here that such interventionism has origins in the enslavement era. Slave masters felt they had duties to enact laws not only for themselves but

for their slaves; the masters felt that it was their duties to intervene when their slaves fought or quarrelled among themselves – they felt that they had the self-bestowed mandates to discipline their slaves even though the slaves were not in turn allowed to discipline the masters (Fede *et al*, 2017). In fact, this scenario still obtains at a global level where Euro-American states and institutions arrogate the privileges to discipline, including sanctioning, African and other states of the global south; the Euro-American states, in spite of claiming to champion equality, cannot even imagine themselves being in turn punished or disciplined, for (neo-)colonial looting, exploitation and dispossession, by African states. In other words like slave masters of the old Euro-American states, institutions and organisations continue to believe that they have the right to discipline their African (neo-)slaves and (neo-)colonies, even as some of the conflicts on the continent issue from the meddling of the Euro-American military-industrial complex (Schmidt, 2013; Baack, 1985; Dunlop, 2011; Al Jazeera, 11 January 2014). In the guise of representing African citizens' human rights, Eurocentric 'civil society organisations' scream to the (neo-)slave masters for disciplinary interventions - designed not necessarily to bring peace among the (neo-)slaves but to keep the interests of the (neo-)imperial order. How (neo-)imperial interventions can bring peace to Africa in the absence of restitution, reparations and restoration is cause for wonder.

Eurocentric human rights and humanitarian jurisprudence are questionable in a world where Africans are not only animalised but also sacrificed in the interests of transnational corporations and capital. In a world where sacrifice and "humanitarianism" are not necessarily antinomies, to be given "aid" does not necessarily cancel out being sacrificed in the short term or long term future. In fact, Africans have for centuries been urged to sacrifice their cultures, families marriages, kinship systems, economies, livelihoods and politics in the interest of (neo-)imperial ideologies and machinations. The call here is for the recognition of the fact that Eurocentric global jurisprudence is, for Africans, a jurisprudence of sacrificing the (neo-)imperial subjects. Viewed from the interstices between Africa and Euro-America, Eurocentric global jurisprudence is not about

rationality, justice, objectivity, logic and impartiality – rather it is about the irrationalities, illogicalities, partiality and injustices that explain the (neo-)enslavement and (neo-)colonisation of other human beings. Thus whereas Eurocentric Enlightenment thinkers and scholar would argue that the Enlightenment gave birth to rationality, logic, objectivity, equality, justice and so on, we argue that in the interstices between Africa and Euro-America, the so called Enlightenment in fact explains (neo-)colonisation and all its associated barbarities on the African people and their institutions. For Africans, the Enlightenment era did not necessarily bring about light, humanism and associated human rights – rather in so far as it is associated with (neo-)colonisation, it brought about the animalisation, dispossession, plunder and exploitation of African people.

While Eurocentric scholarship claims that Western epistemologies, including those arising from the Enlightenment thinking, brought about humanism and human rights, we contend that African Ubuntu-informed humanism and human rights did not originate from European Enlightenment epistemologies. In fact, right from the enslavement era through to the (neo-)colonial era, Eurocentric epistemologies have denied Africans their human essence, dignity, freedoms and liberties – Africans are still denied their human rights to own their resources and properties that are currently controlled and being grabbed by callous transnational corporations (Nhemachena *et al*, 2017b). Africans are still being denied the essence of their original African identities, theories about becomings, about process ontologies, flux, change, hybridity (Nhemachena *et al*, 2017a) are being foregrounded as ways to foreclose African claims to restitution and restoration of their resources and properties. Critically interrogating these issues using lenses of Afrocentric social theory as well as what we call global jurisprudential apartheid, this chapter argues that African original identities are central to building an African legal theory and jurisprudence. Thus, the chapter argues for a jurisprudence rooted in original African identity. The argument is for a right to authentic African identity as a *sine qua non* for reclaiming ownership and restitution in Afrocentric jurisprudence and legal theory. We however

note that these Afrocentric claims to restitution of ownership of resources are being undercut by Eurocentric discourses about Earth Jurisprudence and ecocentrism which defuse and pre-empt African claims to ownership of 'nature', including various other resources.

The Lie of Animistic Earth Jurisprudence? Precolonial African Universities and the Foundations of Pan-African Jurisprudence

Although Africans are often demonised by Eurocentric scholars and thinkers as ignorant and illiterate, originally the continent had precolonial universities such as the Yahya University, Jonga ray Ber University, University of Sankore or Timbuktu. They had 4 degree levels including in jurisprudence, history, mathematics, physics, astronomy, literature, law, grammar, land surveying, engineering, economics, optics, conflict resolution, medicine, chemistry, ethics, poetry, trade and theology up to doctoral levels which were taught by precolonial professors (Nyanchoga, 2014; James, 2009; von Fleischer, n.d.). Africa also had libraries [including the Alexandrian library] with books and manuscripts authored by Africans. The Alexandrian library was sacked and burnt down in the year AD 389 and 642 by a Christian mob which arrogantly described African works and civilisations as pagan (Jonscher, 1999; Sukdaven *et al*, 2015). Apart from showing that precolonial Africans could read and write millions of manuscripts, literature indicates that Europeans such as Pythagoras, Thales, Solon, Plato, Archimedes and Erastosthenes - who subsequently became famous- were trained in Africa where they spent many years learning, before going back to Europe (James, 2009; Cheik Anta Diop, 1989; Mathee, 2012; Bakari, 1997; Asante *et al*, 2015; de Mooij, 2013; von Fleischer, 2004). Thus, writing about Pythagoras, who spent 22 years learning in Africa (Asante *et al*, 2015; de Mooij, 2013), von Fleischer (2004) notes that:

...Pythagoras spent twenty-two years studying in the Egyptian temples where he was taught astronomy, geometry...Pythagorean Theorem...has been attributed to Pythagoras. However, this theorem was long known to the ancient Egyptians and is in fact incorporated in the construction of the great pyramids. The surviving Rhind

mathematical papyrus dating back to about 1832 B.C. reveals the deep mathematical knowledge of the ancient Egyptians.

Some of the African precolonial universities which had become intellectual centres for clerics, judges, doctors and so on since the 11th century (Adamo, 2001) had over 25 000 students located in precolonial cities (The Patriot, 16 October 2014). Thus, although it is often presumed that knowledge is predominantly the product of Euro-America, some of the major scientific disciplines such as medicine, physics, astronomy, mathematics and so on have deep heritages in Africa, China, and India (Modiri, 16 October 2016; Harding, 1994). Precolonial African scripts like the Egyptian hieroglyphics; the Toma and Vai scripts of Liberia; and the Mum scripts of Cameroon (Bakari, 1997) were written and read on the continent before the (neo-)colonialists destroyed the African civilisations, including African universities.

Following the destruction of African universities, including the disciplines of law and jurisprudence that were taught within those academies, some Eurocentric scholars now erroneously presuppose that the concepts and logics of human rights originated from Euro-America (Ghzal, 2015). Human rights laws are presented as if Ubuntu-informed human rights and humanitarianism did not originate from precolonial Africans. It is often conveniently forgotten that Early European travellers, missionaries and traders were treated humanely, in the sense of Ubuntu jurisprudence, by precolonial Africans who gave them shelter, food and care before the same Europeans turned against the Africans (Nhemachena, 2015). Apart from being denied their original laws and jurisprudence that placed high regards on morality and ethics (Idowu, 2009), African human essence is also contested and wrestled by some Eurocentric scholars who perpetuate colonial era denials of African human essence. While African essence is contested by the Eurocentric scholars, other scholars like Mbaegbu, (2015) have argued that African essence, culture and authenticity need to be revived so that they constitute the basis of contemporary Africanity, African Renaissance and Pan-Africanism that in turn constitute foundations for Pan-African jurisprudence. While some Eurocentric thinkers

oppose African authenticity, identities and human essence, Pan-Africanist scholars argue differently. Thus, Lenzerini, (2011: 109-113) argues:

The dynamic characterization of intangible cultural heritage may apparently raise a problem in terms of legal theory. In fact, in order to work properly, law needs a precise definition of the entity to which it applies, and such a definition must be characterized by constitutive elements allowing one to precisely identify the object of a legal rule at any time...Therefore, loss of authenticity can lead to the creation of an artificial...which is no longer connected to the cultural idiosyncrasy of the communities, groups, and/or individuals to which it culturally belongs, hence lacking its distinctive element.

The Eurocentric anti-essentialism that underlies the denial of African human essence erroneously assume that identities are not naturally given (Ogude, 2012). If, as is the case for Europeans, nature is a polite word for God (Nhemachena, 2017) then it means that to deny the existence of naturally given identities translates to denial of existence of African God-given identities. It amounts to a denial of the existence of God in precolonial Africa and much like assumptions of colonialists of the old, it implies that Africans were not created and given their identities by God. Although essentialism simply presupposes the existence of core or essential [African] human values and identities among Africans, it is often mistaken for perennialism which implies unchanging identities and ideas (Ellis, 2004; Harmon *et al*, 2005; Segall *et al*, 2004). Apart from contradicting the history of humanity's common origins and destiny (Mubangizi, 19 May 2016), denial of African human essence has significant implications for the discipline of law and jurisprudence in particular. Denial of the existence of African common human essence not only contravenes evidence to the effect that African identity has deep human essence transcending surface differences (Grinker *et al*, 2010); it also explains the (neo-)colonial assumptions that Africans are indistinct from animals and the rest of nature. Thus, while Richards (2012) accuses Afrocentrists of using Africa as a source of all Black identity, formulating a monolithic essentialist worldview that suggests

shared values and unification of all Blacks, Sesanti (2018: 10) notes that:

Contrary to the view that Africa is populated by many ethnic groups whose cultures and languages have no relation to one another, scientific research, as opposed to impressionistic arguments, point to the fact that African languages are connected, and by extension, demonstrates African cultural connectivity and unity...demonstrates pan-African linguistic and cultural unity, and echoes pan-Africanist scholars' call for African linguistic and cultural unity as a basis for pan-Africanism and the African Renaissance.

The sequel to the denial of African human essence is the denial of existence of African institutional essence – that is, the existence of precolonial African institutions including polities, nation- states, families, marriages, legal institutions, religious, health and economic institutions. In this regard, while some scholars argue that the African nation-state has origins in the European Westphalian order (Quinjano, 2000; Ndlovu-Gatsheni, 2017), other scholars like Murungi (2013) have noted that the denial of the existence of the precolonial African nation-state is linked to the denial of the existence of precolonial African jurisprudence – because law and jurisprudence presuppose the existence of the nation-state that applies it. Thus, precolonial Africans were arrogantly projected by colonialists as living in a state of nature without the nation-states, without families, without cultures, health institutions, marriages, education institutions, without law and jurisprudence. While other scholars note the existence of law, morality, ethics and etiquette in precolonial African cultures (Idowu, 2009; Posselt, 1935; Gluckman, 1965; Gluckman 1964), there are some Eurocentric scholars who argue that Africa lived in a state of nature without nation-states, governments, laws and other institutions. These Eurocentric postulations are contrary to evidence for instance from the Barotse where it has been noted that their jurisprudence realised that morality was part of the nature and foundation of law. It is noted that the Baroste jurisprudence recognised various kinds of African ownership of property (Gluckman, 1965; Idowu, 2009).

The nuances of precolonial African jurisprudence are articulated by Gluckman (1964: 25-41) thus:

...Africans always had some idea of natural justice, and of a rule of law that bound their Kings...Zulu frequently told me this story to illustrate that the laws of the nation bound the King, as well as his subjects, and that the King could not alter or apply the law to meet his own wishes, or the nation would fall into ruins...The actions of Kings were constantly assessed against these procedures and rules, and if they broke the law too frequently, rivals for the Kingly power might genuinely raise rebellion against the King to defend the rules or at least might exploit subjects' grievances to lead an attack on the King for his lawlessness and tyrannical behavior or a section of the nation might for this reason move away into independence from the King...I made it my duty to sit in African courts and record the full details of cases, from the point before they came to court, through pleas and evidence, to final judgement. This experience made me concentrate on how far in judgments on particular disputes Africans were influenced by general principles of ethics. Among the Barotse at least this influence seemed a marked feature. Judges – good judges – were moved to come down on one side rather than the other by what they call *ngana*, which can be translated as “sense” or “reason”, and they explained reason as *Milao yabutu*, the laws of human kind, which I think are fairly equivalent to the law of nature in our tradition. Barotse talk today about their widest conceptions of morality as “Laws of God”. The Barotse to a large extent use the phrases “law of humankind” and “law of nations” interchangeably in many contexts – as the Romans used *ius natural* and *ius gentium*. These phrases cover both this generality of certain basic human institutions which all men must have, and certain principles of ethics which Barotse believe all men must see. If anyone lacks these institutions and does not see the ethical principles, then he is not of humankind. But they distinguish between rules of ethics and institutions, by referring also to the rules of ethics as “Laws of God”...serfs were entitled to be treated as human beings. The King took the abused serfs under his own protection.

In spite of the existence of precolonial African jurisprudence, colonialists presented the African indigenous jurisprudence [in rare cases where its existence was acknowledged] as rich in unfair judgements and demonology which, in colonialists' eyes, would not qualify it as a legal system (Ayodele, 2017). The urgent need to revive African law and African sovereignty associated with it (Ndima, 2013), is underlined by the necessity of an Afrocentric jurisprudential variety [that would aid African renaissance and Pan Africanism] (Ntephe, 2012). Euro-American colonialists destroyed African jurisprudence, African political systems and African social institutions including family and marriage systems, African religious systems. For this reason, it would be underhand to simplistically characterise the destructive European culture and jurisprudence in terms of complexity, materialism, rationalism and so on (Nunn, 1997). It would similarly be deceitful to argue that human rights for Africans originated from Euro-America (Jose-Manuel, 2013). It would be illogical to argue that human rights of the victims of robbery, looting, theft, murder, destruction and plunder originate from the perpetrators or criminals. Logically, criminals cannot originate sound laws, morals, ethics, human rights and humanitarianism for their victims.

It is unfortunate that Eurocentric jurisprudence - in spite of its history of plunder, destruction, looting, theft and robbery, - is often relied upon to dismiss African Ubuntu-informed jurisprudence as particularistic, parochial, "tribal", relativistic, unjust, partial and patriarchal (Burbridge, 2013; Onanzi, 2013). Although notions like power, domination, oppression and so on are used to dismiss African jurisprudence and the African cultures within which they are embedded, it is necessary to note that Eurocentric jurisprudence itself is (neo-)colonial in the sense not merely of dominating and oppressing Africans but also in the sense of supporting (neo-)colonial planetary plunder, destruction, looting, robbery and theft. In other words, the power that Eurocentric jurisprudence has is not only for domination and oppression but also for theft, looting, plunder and robbery on a world scale. So, while Eurocentric jurisprudence is often tinkered with to curb corruption, robbery, murder, plunder and theft - the reality is that the Eurocentric jurisprudence underwrites these

kinds of crimes on a world scale. The jurisprudence is as Janus-faced as it is founded in the criminality of (neo-)colonialism. Thus, noting the inequities of suppressing African jurisprudence in academies, Murungi, (2013: 200-11) argues that:

In the hurry to finish legal education so that they begin practicing law, this question [of decolonising jurisprudence] is not awakened in law students. Any student who enters law school with an interest in the question sees this interest gradually suppressed and eradicated in the course of being trained to think like a lawyer. To bring about this condition is the normal task of the law professors. It can be expected that in their zeal as missionaries of legal education in Africa these professors consider themselves to be doing their job successfully if they can succeed in making African law students forget the question as to who they are...Law schools or the faculties of law in Africa are places of self-oblivion. They are places where Africans are sacrificed or where they sacrifice themselves...One's culture is the eye with which one sees the world. Without it, one is blind. Colonialism sought to render Africans blind by dislocating them from their culture or by destroying it. It sought to replace it with an imitation of the imitation of European culture, giving Africans imitation of the imitation of the European eye. Decolonization of the colonial culture and the decolonization of the colonial eye became imperative. These processes are to take place on the cultural level. Law in any culture is rooted in and is the fabric of the culture in which it exists. The practice of law, legal reasoning, and legal philosophy are aspects of the fabric of one's culture.

Decolonising jurisprudence in Africa requires lawyers and academics in the legal profession not only to pay attention to the exigencies of collecting money from clients but also it requires them to pay attention to the cultural embeddedness of jurisprudence, including ethics and morality. To say that jurisprudence is culturally embedded does not mean that the culturally embedded jurisprudence is not expected to apply to visitors or people from outside specific national and cultural jurisdictions. In other words, to be culturally embedded is not synonymous with being “tribal”, “ethnic”, and “parochial” or “particularistic” – it simply denotes and connotes

relevance in the specificities. The point here is that Eurocentric jurisprudence is not necessarily universal but it is irrelevant in so far as decolonising Africa is concerned – irrelevance ought not to be mistaken for universalism. Eurocentric jurisprudence forbids murder and forced labour while paradoxically tolerating and even aiding and abetting the genocide, exploitation and (neo-)enslavement of Africans by marauding transnational corporations. Eurocentric jurisprudence promotes human dignity while paradoxically denying Africans the dignity of repossessing and controlling their (neo-)colonially looted and stolen resources and properties. Eurocentric jurisprudence promotes equality among human beings while ironically buttressing the Euro-American hegemonies within international institutions including the United Nations Security Council. In the light of the foregoing, it is necessary to avoid mistaking (neo-)colonial Eurocentric jurisprudence for something universal.

In so far as (neo-)colonial jurisprudence strives to capture other peoples, it is cosmetically presented as universal, universalising and inclusive. Discourses of such inclusion and universalisation currently figure prominently in theoretical postulations about ecocentrism, ecocriticism, animism and Earth Jurisprudence wherein nonhumans including nature are portrayed as having agency that is symmetrical with human agency. In such discourses, nature and nonhumans more broadly including rivers, land, trees and animals are deemed to deserve their own rights independent from the rights of [African] human beings (Demos, 2015). While claiming to be more inclusive, universalising or pluriversalising, the discourses on Earth jurisprudence, ecocentrism and animism simply replicate colonial paradigms that deemed Africans and nonhuman animals to be indistinct. The discourses also replicate colonial denials of African human essence that is distinct from animals; they replicate the colonial decentring of African human beings. In other words, the effect of the granting of independent subjectivity and personhood to “nature” or nonhumans is to effectively deprive African human beings of their *locus standi* to sue for restitution and restoration of properties and resources that were looted in the (neo-)colonial eras. The point here is that while discourses about ecocentrism,

ecocriticism, postanthropocentrism and Earth Jurisprudence are often presented as decolonial; as addressing the challenges of colonial “alienation”, “disconnections” and “separations”, the discourses are in fact meant to prevent [Africans] (neo-)colonial victims from reclaiming and assuming **ownership** over their resources. In this regard, the Eurocentric (neo-)colonial jurisprudential sleight of hand is to purport to grant legal personhood, subjectivity and independence to nonhuman entities – and this is a way to defuse mounting pressures on (neo-)empire to restitute, restore and compensate the (neo-)colonial victims of dispossession, exploitation and plunder.

Building on a critique of Cartesian dualism that is deemed to have instantiated binaries, dichotomies, separations, disconnections and alienations (Nhemachena, 2016), Eurocentric jurisprudence and social theory do not speak to the real problems as seen from Afrocentric and Pan-Africanist perspectives. As Nhemachena (2016) argues, for (neo-)colonised Africans the problem is not separations, disconnections or alienations or dualism or binaries – rather the problem is one of (neo-)imperialist implanting themselves onto the continent where they attached looted African resources to themselves. What is more, discourses about “alienation”, “disconnections”, and “associations” and so on obfuscate the more imperative need to restitute and restore stolen African properties and resources that are still in the hands of colonialists and the descendants of colonialists. Whereas the discourses and debates should properly be about restitution, restoration and reclamation, Eurocentric (neo-)imperial scholars have focused on notions of “alienation”, “connections”, “relations” and “associations” – these notions are supposed to obviate the imperatives of restitution, restoration and compensation of (neo-)colonial victims of dispossession and looting. Whereas the discourses and debates should properly be about (neo-)enslavement and (neo-)colonial looting, theft and robbery on Africans, Eurocentric scholarship has focused instead on portraying colonial robbery and lootings as mere “conquest”, “frontiers” or “encounters” – the (neo-)colonisers are simplistically referred to as mere settlers. Whereas the discourses and debates should be about restitution and restoration, Eurocentric

scholarship focuses instead on “development aid” and the supposed paradoxical indebtedness of African victims of (neo-)colonisation. The victims of (neo-)colonial dispossession, looting, robbery and theft are simplistically portrayed in Eurocentric scholarship, as the marginalised, the poor, the underprivileged, the unfortunate, the disempowered, the dominated, the oppressed, the excluded, the underdeveloped, the third world, the developing countries and so on. All these terms are supposed to neuter the criminality of (neo-)colonialism; in other words the terms foreground something other than the criminality of (neo-)colonial lootings, theft, robbery, destruction and plunder.

The point here is that to describe (neo-)colonial robbery, theft, looting and plunder as mere separation, disconnection or alienation amounts to diffusion and the hiding of the criminality involved; to describe robbery and rape and murder as mere “conquest” is also tantamount to defusing and hiding the criminality involved; to describe the incident of robbery, looting, rape and murder and plunder as mere encounter is to defuse the criminality involved. Similarly, to describe the victims of plunder, robbery, theft and looting as merely disadvantaged, underprivileged, marginalised, oppressed, exploited or dominated amounts to evasions of the nets of criminal jurisprudence. In a decolonial context, spades should begin to be called spades – (neo-)colonial criminality should be addressed as crimes and the emergent decolonial jurisprudence should pay attention to these crimes. The point here is that [international] criminal jurisprudence is currently deliberately starved and lean. This is paradoxically the case in a world where Eurocentric scholars prattle a lot about the supposed impunity of Africans for whom the International Criminal Court has chosen to selectively indict since its constitution at the turn of the 21st century.

Because the term colonisation is increasingly being applied to describe bacteria, fungus, and other nonhuman things (Leow *et al*, 1997; Leonard *et al*, 2017; Varela *et al*, 2013), it would appear that the process of colonisation is being naturalised so that it sounds natural that Africa is (neo-)colonised. However, it is imperative to remember that (neo-)colonisation is not merely about moving into an area, place or space but it is about theft, robbery, plunder and looting – these

aspects would apply specifically to human beings and not to nonhuman bacteria. Much as there is equivocation wherein (neo-)colonisation is portrayed as civilisation by some Eurocentrists, in the contemporary era, the terms restitution, restoration and reparations are also being increasingly applied to processes such as refilling degraded land and more generally to damaged environments, including degraded forests (Fay *et al*, 2008; Bradshaw *et al*, 1980; Tripathi *et al*, 2017; Apfelbaum *et al*, 2011). Thus, while the humanistic Ubuntu jurisprudence would enjoin (neo-)colonialists to restitute, restore and compensate the human victims of (neo-)colonial dispossession; contemporary Eurocentric theories about ecocentrism, biocentrism, postanthropocentrism and Earth Jurisprudence are sleights of hand to divert discourses on restitution, restoration and reparation to nonhuman nature. For Eurocentrists, the net effect is therefore not really to decolonise jurisprudence but to devise ways to evade liability for colonial crimes and delicts. Rather, the intention is to devise a jurisprudence of evasion or escape from liability for (neo-)colonial wrongs – thus, the decolonial moment is for some Eurocentrists an era to devise what we call a “fugitive jurisprudence” which is not necessarily decolonial jurisprudence.

Whereas some scholars argue that Earth Jurisprudence, ecocentrism and postanthropocentrism are founded in indigenous jurisprudence (Demos, 2015), we note here that these postulations are in fact sleights of hand designed to erase the original African humanistic Ubuntu jurisprudence. Ubuntu jurisprudence would enjoin (neo-)colonialists to restitute, restore and pay compensation to dispossessed and exploited Africans (Debarati *et al*, 2017: 13). In this sense, contemporary posthumanistic, antihumanistic and transhumanistic discourses simply endeavour to circumvent African humanistic jurisprudence that threatens to usher in real (neo-)empire-reversing decolonisation. In fact, some scholars are already discrediting the African Ubuntu-informed humanistic jurisprudence as devoid of the precision that is needed to make publicly justifiable rationale for judicial decisions (Metz, 2011: 533). The sad presumption by such scholars is that (neo-)colonial jurisprudence is better and clearer than Ubuntu – we argue that the question needs

not be merely about precision, rather there is also a question of relevance, to Africa, of (neo-)colonial jurisprudence.

While such Earth Jurisprudence is celebrated by some as representing a jurisprudential revolution, it is in fact a counter-revolution to the interests of victims of colonial dispossession and exploitation. It fosters the interests of transnational corporations and predatory foreign states seeking to evade accountability to the (neo-)colonised dispossessed. In this respect, we argue that the hurried setting up of a “Universal Declaration for the Rights of Mother Earth”, the setting up of the “International Rights for Nature Tribunal”, the postulations on “Earthcentric Legal Philosophy”, the setting up of “Earth Justice Networks” and the “Centre for Earth Jurisprudence” (Bittermann, 2017) can be understood in terms of the exigencies of (neo-)colonialism. In any case, it is necessary to note that funding for global transformation programmes is provided by transnational corporations which also thrive on dispossessing and exploiting indigenous people – indigenous epistemologies and ontologies will necessarily be massaged and manipulated to suit the needs, including the desired trajectory, of the funders of global transformation.

Thus, in a context where transnational corporations are engaged in a new scramble for Africa in which they are grabbing land from African peasants (Nhemachena *et al*, 2017b), the Eurocentric intellectual discourses that are being applied to the current moment are about returning to nature, attaching to Mother Earth/Mother Nature; marrying nature and having “ecosex” with nature; going beyond anthropocentric definitions of sex; thinking beyond human sexual exceptionalism (Morris, 2015; Johnson, 14 June 2017; Caputi, 2016). Discourses that repeat the colonial animalisation of African human beings are also germane to the context of the new scramble for Africa. Thus, there is currently proliferation of portrayals of Africans as having queer sexuality, living in queer ecologies, possessing queer biologies and having interspecies sexuality– there are efforts in Eurocentric queer theories and queer politics to interrogate and destabilise African normative sexualities, to generate visibility, intelligibility and recognition of more sexualities, sexual orientations and sexual subjects (Morris, 2015; The Sun, 5 November

2016). Of course there are problem with such Eurocentric discourses. The first problem is that the major problem for Africans is not necessarily absence of sexual diversity, presence of heterosexuality, lack of sexual visibility or intelligibility or few sexualities; the problem for Africa is with the (neo-)colonial dispossession, looting, robbery and exploitation for which restitution, restoration and compensation are already overdue. The second issue is that such Eurocentric liberalisation of sexualities, including ecosexuality, has implications for African marriages and family laws. Thirdly, if nature is turned into a legal subject/person and not object, then there are questions about the implication that would have for African jurisprudence of property. There are also political questions including about the fate of African liberation movements and their struggles about restoration, restitution and reparations for (neo-)colonial dispossession of property and resources. Put in another way, the question is, if nature gets to be conceptualised as a legal person or subject and not property or an object, what becomes of African liberation movements' struggles for restitution and restoration of African property?

The upshot of the above argument is that Eurocentric theories are postulating subject-subject ontologies in place of the subject-object ontologies – the implication of this shift is to circumvent extant theories premised on correspondence theory of truth, on objectivist, linear, determinate, rational, predictive foundations (Hughes, 2004; Elsby, 2015). The complexity theories which are being popularised are premised on rejection of correspondence theories of truth – this has the effect of rejecting subject-object relations which are central to African property jurisprudence. Thus, subject-subject [instead of subject-object] relations that are constituted within such theories have the effect of cancelling out African claims to restitution and restoration of property and resources. In this regard, the Eurocentric theories about complexity, and subject-subject relations are not necessarily decolonial. We also note herein that Western epistemologies and ontologies have not necessarily been historically premised on truth, determinacy, impartiality, rationality and objectivity particularly in so far as they portrayed the enslaved and colonised Africans as indistinct from

animals. Also, epistemologies and ontologies that buttressed (neo-)colonisation including the dispossession of other people can hardly be described as rational, objective, determinate and impartial. The denial of cause-effect relationships, and the denial of linearity in complexity theory (Radford, 2008), replicate colonialists' denial of the linearity of precolonial African development. Precolonial Africa was erroneously held by colonialists to be without [lineal] progress, without development, without modernity – in this sense, while Eurocentric scholars portray their epistemologies as having innovated linearity, we argue here that in fact colonial epistemologies denied and stunted precolonial African linearity. Looked at from an Afrocentrist perspective, there was also no truthfulness, rationality, logic and objectivity in colonialists' assumptions and portrayals about Africa. Contemporary Eurocentric claims that Euro-American epistemologies brought about anthropocentrism are also false. As far as Africans are concerned Eurocentrism animalised the (neo-)colonised peoples – Euro-Americans neither anthropocentrised nor humanised Africans and this was precisely the reason why Africans resorted to liberation struggles.

The other implication of notions of Earth Jurisprudence, wild law, Natural law and eco-centrism (Bourdon, 2011; Cullinan, 2013; Maloney, 2011) can be inferred from their association with the Hobbesian chaotic state of nature in which precolonial Africa was erroneously presumed to have been without states, governments, laws, jurisprudence, property rights, families, marriages and order (Nhemachena, 2017). Thus, whereas Gluckman (1964, 1965) underscores that in the precolonial Barotse jurisprudence Africans did not place natural law or Earth Jurisprudence above human law, on the other hand, proponents of Earth Jurisprudence or wild law seek to precipitate a Hobbesian state of nature in which the wild law supersedes African human and Godly laws. Whereas the Barotse placed God's law above nature, Hobbes presumes absence of laws in the chaotic state of nature that he postulates – in fact, he also erroneously assumed that in such a state of nature precolonial Africans had no property laws and could not therefore own property (Sunar, 2016). Sunar (2016: 27-36) notes thus:

According to Hume, private property is a phenomenon which is closely related to the form of government and law. His categorizations therefore, revolve around three main types, which are the savage, the barbarian and the civilized. While the savage indicates societies that have no ownership or political organization...Until then, the more civilized should control and discipline the less civilized. The foundations of the idea to control non-European societies in the name of civilization versus the barbarian, were thereby laid, only to be reinforced and made dominant all throughout the 19th century...the exponents of the Enlightenment thought that humanity reached a more scientific and rational mentality in the modern period. Accordingly, savages... cannot think on causal grounds and have difficulty in controlling their emotions. A civilized individual on the other hand, holds on to an analytical thinking based on universal causality, and is thus able to suppress his emotions...Enlightenment thinkers claim that the fundamental difference between civil Europe and savage others is the institution of law. They argue that law rules over civil society. The citizen is related to the state through laws...In the lands of savages, on the other hand, people do not obey laws but rather obey the master and his personal law.

Hume's presumptions make plain the shortcomings of contemporary Eurocentric postulations about the supposed necessity for Africans to grant independent subjective personhood to nature. Granting the supposed independent subjective status to nature merely replicates (neo-)colonial erroneous assumptions about African being *res nullius* and *terra nullius* – Africa has for centuries been portrayed by (neo-)colonisers as without owners and as empty land respectively. Of course, like any other robbers and looters (neo-)colonialists had to assume that the African property and resources which they stole were independent of their human owners – this logic is being repeated in the contemporary era in which transnational corporations are again scrambling for Africa, and grabbing African land. In fact, to address African property as “nature”, “environment”, “wild”, “independent” of humans and so on was part of the colonialists' ways to dislodge and neutralise African ownership and control – indeed sometimes the colonialists addressed African

human beings themselves as wild, as very close to nature and therefore without capacity to own “nature”. In this regard, when (neo-)colonialists, in the contemporary era, deny restitution and restoration to dispossessed Africans, the implication is that the Africans so denied are still in the supposed state of nature, close to nature, wild, barbaric and without the human capacity to own and utilise property and resources.

If human beings have the unique capacity to own property, then the denial of clear and distinct human identities effectively translates to denial of the right to own property which belongs to the distinct species human. Though other scholars celebrate contemporary crusades for hybridisation of [African] identities, human cloning, humanoid robots, synthetic biology, nanotechnology, genetic technologies, microbots or biohybrids - as heralding posthuman, antihuman, transhuman, postbiological futures in which human beings will supposedly overcome their biological limitations including health, mortality and morbidity; we contend that there is in them an underlying (neo-)imperial antipathy to natural original African bodies. We draw parallels between enslavement and colonial era antipathy to original African bodies and identities, on the one hand, and, on the other hand, the contemporary crusades for posthumanism, antihumanism, transhumanism, postbiological futures and postanthropocentrism.

Becoming Posthuman? Humanoid Robots and the Implications for Labour and Family Jurisprudence

While African national constitutions, the African Union and the United Nations provide for inalienable human rights, contemporary popularisations of posthumanism, transhumanism, antihumanism and postanthropocentrism have the effect of reversing [African] human rights, including Ubuntu-informed humanistic jurisprudence. The human rights are cancelled out through cloning, hybridisation of human beings, creation of humanoid robots, and injection of human beings with microbots or biohybrids, and genomics which render human identities fuzzy. While wearable devices, chips and biohybrids or microbots are being celebrated as useful in monitoring health -

including by remote control, we note that these aspects have ramifications on the human right to privacy, dignity, freedoms of assembly and association of the human beings on whom they are used. We also note that industrial humanoid robots have deleterious effects on labour and employment laws, which are currently anthropocentric. Similarly, the humanoid sex robots that are set to replace human beings in marriage and sexuality have huge implications for family and marriage laws, which are also currently anthropocentric.

In addition to legal challenges attendant to indicting, sentencing and punishing humanoid robots (Asaro, 2007; Hallevy, 2013), there are human security implications of the production and deployment of humanoid robotic soldiers, human wearable robot exoskeletons, the production and deployment of superhuman strength, speed and endurance (Veruggio *et al*, 2008; The Telegraph, 5 July 2017). While human enhancements and human augmentations are understood to provide technologies and techniques for “overcoming limitations” of human cognitive and physical abilities via enhancements of human strength, endurance, vision, intelligence, mood and personality (Brey, 2008), there are legal and security challenges in these interventions. There are security implications in situations where human minds, bodies and affects are modified – legal questions also revolve around the *mens rea* for offences where the offenders are enhanced and augmented cognitively. In addition, there are questions about the transformations of human identities – as noted earlier, clear human identities are central to claims for restitution, restorations and compensation for historical dispossession and exploitation. Yet enhancements and augmentations erase original identities that are central to such indigenous struggles for restitution and restoration – in other words, the enhancements and augmentations perpetuate colonial logics of erasure of original African identities.

Although there are some celebrations, by some thinkers, of the fact that scientists can now quickly and precisely alter, delete and rearrange the DNA of any living organism including human beings to “correct” genetic flaws and to “enhance” desired traits (Specter, August 2016); such manipulations have their downside. The challenge is not only that the genetic alterations affect generations of

descendants of the affected individuals who inherit the alterations but some DNA engineering has also resulted in transgenic identities in which human beings carry the DNA for other species including animals wherein they constitute human-animal chimeras (Brey, 2008). Apart from the possibility that such people with “enhancements” can be categorised as deviants, freaks, monsters or mutants, the “enhancements” and modifications destroy the self-concept or ontogenetic identity (Brey, 2008) thereby negating originality and African human essence that are crucial for reclaiming restitution and restoration from (neo-)colonialists. Besides, the manipulations negate the genetic heritages or human genetic history since there are also infusions with the genes of a third person - apart from the father and the mother (de Oliveira *et al*, 2012). The point here is that to reclaim various African heritages, one needs to possess the genetic heritages from generations of parents and grandparents – if genetic heritages are wantonly manipulated and thereby lose their originality, the question is about how the resultant genetically non-original Africans can reclaim original ownership of the property and resources?

The challenges of genetic modifications are well captured by Knoppers (1991: 1-16) thus:

At the same time, the potential for this science lies in the knowledge it provides; knowledge that will finally force to the forefront a discussion of the nature, uniqueness and potential for change of the human species...There is no doubt that the new tools of human genetics do and will affect the human being in the ultimate substratum, namely the gene...In 1982, the Council of Europe, in its recommendation on Genetic Engineering, advocated that the right to life and to human dignity implied the right to an unaltered genetic pattern – one that had not been artificially altered. It also proposes that this right should be made explicit in the European Convention for the Protection of Human Rights and Fundamental Freedoms ...there is no doubt that respect for the human body, for one’s genetic make- up and origins, is indivisible from respect for the person...The Council of Europe linked the right to protection of the genetic heritage to the right

to life and to human dignity...heritage is seen as an estate, a right of endowment inherited from one's ancestors.

The production and implantation of nonhuman Ubuntuless emergent cloned entities and humanoid robots, that do not have African genealogical ancestry (Olasunkanmi, 2014), is inimical to liberation struggles to reclaim African ownership of African resources. Thus, much as Africans were colonised by colonialists who did not belong to African communities and who did not practice Ubuntu, morality and ethics and who did not respect African genealogical ancestry, Ubuntuless clones and humanoid robots that are being implanted in Africa threaten to replicate experiences of colonisation. Although some argue that human genetic engineering will facilitate human beings reaching another stage where science is used to enhance physical, emotional and cognitive abilities in a posthuman stage and transhuman stage (Morales, 2009; Ferrando, n.d), it is necessary to examine the proprietary underside of such genetic engineering and technoscientific inventions. Thus, Morales (2009: 41) observes that:

We have already started a transition, a transhuman stage, which we should consider a transition to a posthuman stage, where humans will transcend their inherited body, with all its physical, social, emotional, and cognitive limitations, and convert it to an enhanced body, which will have more chance to deal with the continual pressures and demands of our rapidly developing human civilization.

Animated and punctuated by artificial intelligence [part of which is derived from the uploading of human consciousness onto technological substrates], humanoid robots, transhumanism and posthumanism seek to destabilise, decentre, decompose and deconstruct the real African human beings whose human essences are thereby disrupted and supplanted (Ferrando, n.d; Sharon, 2013). Turned into hybrids, the [African] human beings are being celebrated as becoming posthumans and transhumans or becoming postanthropocentric. Further deconstructing and decomposing African human identities, some scholars argue that humans need to

relinquish human dominance; they argue that humans need to overcome such human dominance by becoming machines that is by uploading their consciousness into computers or by existing as disembodied software or higher forms of “intelligent” life (Sharon, 2013). In this sense, proponents of posthumanism and transhumanism urge humans to become cyborgs, to become merged with machines or to become human-machine hybrids, to become ambiguous, to become transgressive/rebellious and break down boundaries of identities, of sexuality, of race and of species (Sharon, 2013). Thus, Sharon (2013: 47-8) argues:

The cybernetic model thus contributes to a displacement of the unique position of the human by arguing for a conceptual absence of differentiation between humans and nonhumans. First because all systems, be they organic or non-organic, are construed as information systems, and secondly because the interesting units of reference became networks – or posthumans – that are made up of organic and non-organic elements, systems and environments, through which information flows...Mind uploading assumes that there is something essential to selfhood which can be reduced to a computational configuration and can be relocated and preserved in a different medium – the computer –without the essential properties of the original configuration being significantly changed.

Understood as postbiological societies in which minds are uploaded to silicon or carbon based bodies, it is noted that in such an emergent New World Order, human beings will have no genetic heritage to transmit (Webb, 2015; Weinstein *et al*, 2017). In such a postbiological, posthumanist world, humanoid robots will be used as servants for jobs such as cleaning and housekeeping, it is noted that humanoid robots will be fast, accurate, never bored, they will babysit with patience, with talkativeness; they will be able to play games both intellectual and physical, they will assist the elderly and the handicapped in clinics or at home - being available, reliable, and having been taught to provide physical support (Veruggio *et al*, 2008). Humanoid robots would also take up jobs like the ones for doctors, teachers, lecturers, drivers, pharmacists and lawyers – the humanoid

robotic animated lawyers are called robolawyers while animated doctors are called robodocs (The New York Times, 28 November 2013; Nhemachena, 2017).

Such industrial humanoid robots raise many questions about jurisprudence: they raise legal issues around the nature of labour and employment law in the future of Africa where the future labour market is threatened with invasions by humanoid robots. Humanoid robots raise questions about the future of African human workers or employees; they raise questions about the future of workers' and Trade Unions in a future industrial environment that is populated by humanoid robots that would have replaced human beings. Also raised are questions about the future livelihoods of Africans that would have been (neo-)colonially dispossessed of their land and livestock and then pushed out of employment

Apart from humanoid robots taking over jobs from human beings, humanoid sex robots [also called sexbots] are set to replace human beings in marriages and sexuality. The humanoid sex robots are being produced and sold by some corporations and they are being advertised as capable of reducing crimes as well as of decreasing sexually transmitted infections; they are argued to be set to replace prostitutes; to help stamp out sexual slavery and trafficking (Mail Online, 23 August 2016). Although male and female sex dolls are already being produced and sold for about US\$9995, 00 (Mail Online, 30 June 2016), humanoid sex robots are projected to become widely available around 2030. Although it is (neo-)imperialism that largely accounts for the instabilities, destruction and break down of African states, families and marriages, global capital is currently marketing the humanoid sex robots as therapy and companions for lonely, disabled and old people (The Telegraph, 5 July 2017). The humanoid sex robots that can blink, talk, smile, regurgitate facts about life and have sex with human beings are being manufactured (The Telegraph, 5 July 2017) to replace human spouses some of whom are accused of being quarrelsome and being "liberated", through feminist movements. With original African marriages being destroyed partly due to colonial erasures (Posselt, 1935), Africans are set to be impelled to have sex with emergent humanoid sex robots. Posselt (1935: 116) observes of colonial Zimbabwe thus:

Unfortunately the disintegrating influences are also corroding all restraint and discipline born of traditional custom and enforced by tribal institutions, thus undermining the very foundations on which family life and communal organization are reared, yet failing to develop that sense of individual self-respect and responsibility without which organized society cannot progress...It is a painful reflection that a primitive people is usually debased by its first contact with European culture, that is reduced to a lower level than the one it had attained. Why should the good contained in the social and ethical structure of such a people have been destroyed before European ideals can take root?...Can we not enlarge and beautify the existing edifice without razing it to the ground?...We must learn first to appreciate the outlook of the Native, to respect his ideals, and to gain a truer perception of his capacity before we attempt to apply the cramping effects of change. After all, it is surely better to let him grow up as a true child of African culture than to change him into the spurious product of another civilization.

Although in the United Kingdom, the government has recently encouraged human married parents to stay together for the benefit of their children (The Telegraph, 4 October 2017), humanoid sex robots have been declared in some countries to be legal persons with constitutional personhood (Pagallo, 2017). The paradox in all this is that some Eurocentric NGOs and “civil society organisations” are busy deconstructing and decomposing African families and marriages on the basis of the ideology of patriarchal domination, which exempt or is lenient to transnational corporate domination or the domination of international NGOs and “civil society organisations” which are themselves funded by patriarchal transnational corporations. In this regard, the NGOs and CSOs are effectively promoting a posthuman agenda in Africa where the decomposition of African marriages and families will provide opportunities for transnational corporations to subsequently commercialise African sexual relationships by selling humanoid sexual partners, to replace human sexual partners and spouses (Daily Star, 18 November 2016; Goldfeeler *et al*, 2015; Hubbard, 2011). While Eurocentric ideologies are wrecking original authentic African

marriages and families which were more stable during precolonial eras (Posselt, 1935; Holleman, 1969; Aschwanden, 1982), humanoid sex robots are being produced to replace human partners – the humanoid sex robots are being advertised as possible to own, controllable, as possessing no personal agenda, as more compliant than liberated human wives, as faithful, never to catch diseases including sexually transmitted infections, patient, loving, kind, never jealousy, not arrogant, not boastful, not rude, truthful, trusting, persevering, uncomplaining, complementary, sharing sense of humour; very smart and sexually attractive, as tools to fight patriarchy, compliant and not prone to break the hearts of owners (Hubbard, 2011; Daily Nation, 23 December 2016; Mail Online, 23 August 2016; BBC, 6 January 2017; Levy, 2017; Mail Online, 20 December 2016; Daily Star, 18 November 2016).

Humanoid sex robots are also understood as products of Satanic attempts to imitate God by creating life or synthetic humanoids to bring about spiritual anarchy in the world; the humanoid sex robots are also linked to Biblical fallen angels and historical giant monsters that raped human women (Scala *et al*, 2009; Johnson, 1996; Johnson, n.d). Other scholars link the promotion of humanoid robots, homosexuality, virtual sex, teledildonics, single parenthood, nonprocreational sex, open marriages, abortion, masturbation, redefinition of marriage, self-worship promiscuity and destruction of marriages and families to the global elites' secret society cult called the illuminati (Tucker, 2013; Dice, 2016; Payson, 2003; Birch, 2007, New American, 19 June 2015; Knight, 2003; Bennett, 2003; Welch, 1985) which is understood to be steering the world towards a New World Order which will be marked by order in chaos.

Such order in chaos, which is appropriately theorised by Anarchist theories Nhemachena, (2016), would be characterised by logics of sorcerous and witchcraft conjurations wherein virtualities including virtual sex over distances (Mireault, 2014) would replicate invisible tokoloshe beings of the world of sorcery and witchcraft. Much like in the world of sorcery and witchcraft where tokoloshe, mischievous or evil beings or witchcraft familiars with huge penises, are understood not only to wreck human marriages but to also force sexual intercourse on human women and girls (Bulawayo24 News, 7

February 2017; New Zimbabwe, 17 April 2009; Digby, 2006; Daily Telegraph, 9 September 2014; News24, 5 October 2004; IHARARE, 5 March 2015; Mail & Guardian, 27 January 1995; Nhemachena, 2017; Botswana Adventure, 31 October 2011); virtual sex involves massive multiplayer online reality sign up for online presence with virtual weddings, cybersex between strangers in different parts of the world- who can bring about orgasm by remote control using remote sex technologies called teledildonics and fundawear or vibrating pants (The Guardian, 6 June 2014; Rheingold, 1998; Inkinen, 1998). Celebrating virtual sex thus, Rheingold (1998: 274-275) observes:

Postmodernists will have lots of sex, incredible varieties of sex, imaginative sex, but virtual sex doesn't beget, to use a biblical term, children. Postmodern sex would be recreational but not procreational...Sex without consequences and complications is the postmodern promise in a teledildonic age... Thirty years from now, when portable teledilders become ubiquitous, most people will use them to have sexual experiences with other people, at a distance, in combinations and configurations undreamed of by precybernetic voluptuaries. Through a marriage of virtual reality technology and telecommunication network, you will be able to reach out and touch someone – or an entire population – in ways humans have never before experienced.

The order in chaos or anarchy is underwritten by Euro-American promotions of homosexuality around the world, (Global Research, 28 October 2015; Eppretch, 2013; The Guardian, 8 March 2014). In other words, while it is noted that only devils and witches would fornicate performing all kinds of sexual acts from incest to homosexuality to sodomy and bestiality (Lima, 2015), there are vigorous efforts by Euro-America to promote and normalise the homosexuality and bestiality (Dice, 2016). The connections between the illuminati cults and the homosexuality agenda are explicated by Zagami (2016: 129 - 130) thus:

In a society that already struggles with poverty and growing social problems, the elite and their illuminati slaves instead indulge in the

advocacy of a liberal agenda that openly promotes gay marriages, abortion rights, and Satanism. This effort is supported by an increasingly sick elite that is full of hypocrites, and who secretly intend to eliminate a large part of the world's population, as they stated on the Georgia Guidestones, including the commercialization of human body parts, as exposed in the Planned Parenthood Controversy in 2015...In England, homosexuals reside at the top of the hierarchy that rules the United Grand Lodge of England, and their more popular rite called Emulation, which only opens to dark energies and chaos. In their Masonic Lodges and Illuminati sects like the Ordo Templi Orientis, many openly promote homosexuality and bisexuality as added values in line with their "prophet" Aleister Crowley, and his depraved cult of Thelema, where their motto is: "Do what thou wilt..."

The colonial portrayals of Africans as indistinct from animals, and more broadly nature, are not only resilient but they are being intensified in the supposedly postcolonial era in which Africans continue to be ideologically interpellated to change their identities, to destroy and devalue their families, humanism, ethics, morality, marriages, politics and other institutions. Discourses about becomings, flux, change, transformation, performativity, agency and so on are foregrounded to persuade Africans to change their identities in a context where (neo-)empire is haunted by unresolved crimes and sins of the past. Instead of changing its own imperial essence, (neo-)empire exhorts (neo-)imperial subjects to change, to become animals, to become imperceptible, and to be nomadic (Nhemachena *et al*, 2018). Having been dispossessed of their land, livestock, marriages, families, cultures, epistemologies, politics, jurisprudence, economies, and human essences, Africans are set to become animals in an envisaged ecocentric, wild, posthuman, transhuman and postanthropocentric New World Order marked by the transnational corporations' 21st century new scramble for Africa. In other words, Africans are increasingly being pushed into what Frantz Fanon (1963) calls the zone of nonbeing which is in this case characterised by the Hobbesian state of nature and where there is the rule of order in chaos and anarchism. The paradox of the ongoing Eurocentric animalisation of Africans, particularly through

discourses on “becoming animal”, is well captured by Hiebert (2003: 116-122) thus:

Yet it is a form of particular import for one cannot take oneself too seriously if one is becoming animal. Rather, the becoming-animal is from the start a parodic and liberating endeavor – one whose ambivalent seriousness is tempered by an ambivalent laughter. Perhaps it is only the animal who laughs seriously after all...And Foucault’s world then is no longer simply a world of becoming parrots, but of becoming - monkeys. Not simply the voiced repetition of words of freedom, but the behavioral mimicry that is a result of normalization...And...for the indivisible remainder of the self is precisely that which becomes apparent by becoming chameleon. And there are two distinct forms that this becoming engages with. The first is the chameleon’s peripherally placed eyes, yielding a vision that spans almost 360 degrees. For the becoming-chameleon sees very well the world in which it participates – yet it is a sight that emphasizes the paradox of not being able to see one’s own, spectral self...The becoming-chameleon too has to contend with its ever changing colour. The chameleon’s transparent skin holds viral layers of pigment that change colour independently of its will, in response to the light, shadows and temperature of its surroundings.

Decolonisation of jurisprudence cannot be realised by encouraging Africans to become animals, to lose their identities and essence or to become queer or indistinct from nature. In fact, these aspects are the very antithesis of decolonisation or decoloniality – they are foundational to colonisation or coloniality. Decolonisation would require possession of clear African human identities including genealogical histories about lineages and forebears.

Outline of the Chapters

In Chapter two, Artwell Nhemachena & Esther Dhakwa argue that contemporary paradigms or theoretical postulations about posthumanism, animism, fetishism and transhumanism propel forward the (neo-)imperial project that loathes the bodies and

authentic identities of the African others. It is argued that the postulations replicate (neo-)imperial denials of restitution, restoration and compensation to the African (neo-)colonial victims of dispossession, looting, robbery, theft, exploitation and genocide. Deemed to be other-than-humans, to be indistinct from nonhumans, from animals, and deemed to be becoming transhumans and posthumans, Africans will not be able to claim their human rights to restitution, restoration and reparations for various (neo-)colonial crimes. The authors argue that whereas these contemporary Eurocentric theories deny the existence of clear identities, the law requires clear identities of the parties appearing before the courts – if Africans get to be regarded as indistinct from animals, or from nonhumans, the question is how then are they going to claim human rights in the courts that require clear identities of the litigants? It has also been argued that whereas African Ubuntu-informed humanism entails ethics, morality, etiquette, restoration, restitution, reparations, justice and observance of laws, Eurocentric human rights jurisprudence pays scant attention to ethics, morality, etiquette, justice, rationality, logic, objectivity, truth, reparations and restitution. If the Eurocentric human rights jurisprudence had morality, ethics, objectivity, rationality, justice and etiquette at its centre, it would have ensured that (neo-)colonial victims of dispossession, exploitation and genocide were restituted, restored and repaid. In fact, if Eurocentric jurisprudence had justice, morality, ethics, objectivity, rationality, etiquette and logic, the Eurocentric human rights jurisprudence would have prevented the (neo-)colonisation of Africa in the first place. Nhemachena and Dhakwa argue that real human rights emanate from Ubuntu-informed jurisprudence which explains why Africans did not colonise the world: the fact that Euro-America (neo-)colonised the world casts long shadows on the supposed justness, rationality, objectivity, logic and morality of their jurisprudence which is sadly paradoxically considered by some thinkers to be the right models for global justice and legality. One of the critical questions that run through the chapter is, if Eurocentric jurisprudence failed to prevent the colonisation of the world by Euro-America then how can such jurisprudence prevent the neo-colonial injustices, illegalities and inequities including the ongoing 21st

century dispossession of African peasants by transnational corporations?

Everisto Benyera's chapter three characterises the colonial relations between the west and its colonies as a parasitic relationship that is based on various modalities of theft. He uses the terms 'Euro-North America', 'colonisers' and 'west' interchangeably to generally depict the colonising nations, severally and jointly: the term 'colonies' is used to refer to those continents, countries and communities that are at the receiving end of (neo-)colonialism and coloniality. This is however not to deny or undermine the differences in both the colonising nations, Euro-North America, western countries and the colonised nations. Conceptually, the chapter views the subjugation of Africa as having started with the dispossession of Africans, destruction of African sovereignty, hemispherisation, slavery, colonialism and the current phase of coloniality. For this reason, the author presents the modalities of theft from Africa not only as historical facts but also as an ongoing reality. The resilience of colonialism, including the power relations that remain tilted in favour of the colonising nations and against the colonies, is termed coloniality. For Benyera, decoloniality is the endeavour to unmask and jettison the various manifestations of forms of power relations wherein the colonial relations barely changed in the aftermath of the various decolonisation processes. Therefore, it is argued that colonisation outlived decolonisation and the product is coloniality. In his chapter, Benyera explores decoloniality in terms of the theft of African history by the west.

In chapter four, Theobald Frank Theodory highlights critical issues regarding traditional land ownership in African contexts. He argues that during the pre-colonial era, local people had their own indigenous systems of land ownership. In this particular period, the power to allocate the land was vested in the chiefs who had the authority over the use of land resources. In this regards, the advent of colonial regimes undermined the functions of the local African chiefs with regard to land administration. Land was a target of colonial regimes for the production of the required raw materials like crops, forest products, minerals, and wildlife. The inception of colonial systems of land administration triggered many challenges on

the land administrations within the community. For Theodory, most of the land ownership problems that exist in African countries today have their origins in the colonial era. Colonialists did not only introduce systems of common and statutory law, rather the colonialists also dispossessed and looted African land. This relegated the Ubuntu-informed customary law to lower status. It is from this context that existing land administration systems in Tanzania do not give equal rights to indigenous people to have access to sufficient land for their livelihood activities such as farming and grazing of animals. This is because the Tanzanian government inherited a large part of common and statutory laws from the colonial land administration.

Critically interrogating the notions of man, human rights and *Anthropos*, Everisto Benyera, Oliver Mtapuri & Artwell Nhemachena's chapter five demonstrates that according to liberal western episteme, not all persons, that is, Homo sapiens are human beings as some are regarded as *humanitas* while others are *anthropos*. They argue that the term human is not universally applied to all people and so does the Eurocentric notion of human rights. Eurocentrism holds that the *humanitas* and the *anthropos* are at different stages of their lives with the peoples of the formerly colonised world still fighting for the rights to their rights while those of the former colonisers are at a stage where they are fighting for what we can term e-rights. These include the rights to faster internet connectivity and the rights to cleaner and greener environments surrounded by a variety of fauna and flora constituting a diverse and balanced ecosystem. The trio argue that the *kolossos* challenge facing the totality of the human race is therefore the ever-increasing gap in the lived conditions of the *humanitas* and the *anthropos*. The *anthropos* are ever becoming more thingified, marginalised, objectified and expendable. On the contrary, the *humanitas* continue to live life to the fullest, enjoying everything from white privilege to the ill-gotten wealth from the various thefts from Africa and everything in between.

In chapter six Ruby Magosvongwe asks critical questions including that; if jurisprudence is philosophy of law, can the language of the coloniser aptly and adequately express the African anguish of

dispossession, exploitation, manipulation, dehumanisation, rape and enslavement, and interpret with precision and clarity the desires of the Africans, and answer to the calls for litigation, equity, reparations, respect and social justice without causing further damage? Have the necessary adjustments been made to stem the disfigurement, dispossession, dismemberment and intellectual holocaust caused by the legacy of colonialism? Magosvongwe convincingly argues for building an African jurisprudence that is premised on African experiences and African literature.

Arguing for a Pan-African jurisprudence for the environment, Felichesmi S. Lyakurwa's chapter seven discusses the issues on environment, mining, interventions and Pan-Africanist models of justice in relation to the Lake Victoria gold fields in Tanzania and Obuasi gold mining in Ghana. The chapter argues that there is need to shift from the Eurocentric environmental justice model to a Pan-Africanist jurisprudence for the environment model that priorities restitution, restoration and reparations to (neo-)colonially dispossessed Africans. For Lyakurwa, transnational mining corporations do not fulfil their corporate social responsibility promises to the African local communities and so the Eurocentric environmental justice model is not useful in ensuring that Africans repossess, own and control their resources. In other words, there is no justice for Africans in the Eurocentric environmental justice model. It is argued that there is a wrong assumption [in the environmental justice model] that there can be justice to the environment, even if without the realisation of justice to (neo-)colonially dispossessed Africans. For Lyakurwa, for there to be justice, it is necessary to first address and redress (neo-)colonial dispossession of Africans. He argues further that it is only an irrational, illogical and underhand Eurocentric jurisprudence that would try to leap frog the restitution, restorations and reparations which are due to (neo-)colonially dispossessed Africans— first things always have to come first.

Chapter eight is authored by Oliver Mtapuri, Artwell Nhemachena & Everisto Benyera. The authors argue that a Pan-Africanist jurisprudential theory of migration requires Africans to be wary about the contemporary exhortations for the continent to be

open, because the openness that Eurocentric scholarship is urging replicates colonial assumptions about the supposed emptiness and openness of Africa. The chapter argues that openness effectively translates to vulnerability of Africans particularly in a world full of vulture-states that seek to loot and exploit African resources. The authors posit a Pan-African jurisprudential theory of migration which not only takes note of constitutional provisions on the freedom of movement but it also takes cognisance of the fact that Africans do not only need the right to freedom of movement that is not accompanied by restitution and restoration for dispossessions. The chapter argues that granting notional freedom of movement to Africans without also granting them the material means to move freely would be to play irony. It is argued that to provide Africans with freedom to move and look for jobs translates to freedom of movement to become transnational corporations' slaves or cheap labour. Whereas in pre-colonial Africa, Africans moved freely in pursuit of their own commercial or trading activities, contemporary Africans often migrate in search of jobs many of which are low paying. It is argued therefore that there is need to be careful because freedom of movement can effectively entail the freedom to seek bondage in transnational corporations' factories located in different places in the world. The authors therefore argue that freedom of movement needs to be preceded by restitution, reparations and restoration in order for the right to freedom of movement to be meaningful. The trio argue that the major problem for Africa is not that colonialists constructed borders in Africa – rather the problem is that Euro-America is enclosing and locking up African resources and properties within Euro-American borders. Put in another way, the problem is not about the presence of borders in Africa, rather the problem is about the fact that African resources are looted and stocked, for centuries, within Euro-American borders. The authors argue that the problem is not about the existence of borders in Africa but it is about the existence of borders in Euro-America of which borders permit African resources to enter freely while ironically shutting Africans out of those borders. The suggested solution is therefore to prevent the transnational corporations' looting of African resources – the solution is not to destroy or decompose

African borders. An African jurisprudence of migration needs to take cognisance of this important aspect.

In chapter nine, Tapiwa V. Warikandwa & Samuel K. Amoo argue that African countries need to rethink their reliance on comparative law. The authors argue that it is evident that comparative law has largely been employed as a tool for advancing social engineering in pursuit of western imperialist agendas. African countries have lost their identities and value systems through employing foreign legal systems to regulate their societies. The duo argue that decolonisation has failed to take place as African economies are still regulated through western laws. It is therefore imperative that reliance on comparative law be reviewed in African law schools, in legal practice, in courts and any other relevant legal institutions. If at all comparative law must continue to be relied upon, it is proposed that it be done within the African context. Warikandwa & Amoo argue that such comparative study must focus on; 1) studying how transplanted foreign laws in Africa have negatively impacted on Africa's development; and 2) evaluating how to integrate African Customary Law in Africa's legal system. To achieve this objective, African scholars must be encouraged to publish rigorous publications advancing the Pan-African law/decolonisation agenda from a scientific perspective. It is argued that Pan-African comparative law must be made a mandatory part of every African law school's curriculum as part of the decolonisation agenda. Legal academic literature must also be relevant to the African context as opposed to the current context in which legal textbooks are written in Europe, using the European context, for use in Africa. The authors argue that this approach only serves to promote the imperialist agenda and undermine Africa's development agenda.

Lovemore Chiduzwa's chapter ten argues that although the judiciary under the leadership of the then Chief Justice Chidyausiku assisted in the indigenous Zimbabweans' repossession of their land, some thinkers unfortunately argue that the judiciary failed to protect the property rights of several of its citizens in relation to the expropriation of land in Zimbabwe. The author argues that although the judgments handed down by the courts appeared to entrench "human rights abuses" during the repossessions of land by indigenes,

the judgments also sought to address colonially induced injustices and illegalities pertaining to the colonial dispossession of indigenous Zimbabweans. The Zimbabwean national courts as well as the regional courts and tribunals that were seized with the Zimbabwean matters had to take into cognisance the fact that the constitutional rights of the evicted farmers had to be weighed up against the rights and interests of indigenous Zimbabweans. The author argue that the SADC Tribunal collapsed due to its evident failure to properly address the delicate issue of indigenous people's land repossession in Zimbabwe.

In chapter eleven, Tapiwa V. Warikandwa & Patrick C. Osode argue that South Africa's Black Economic Empowerment (BEE) policy is not simply a moral initiative to redress the wrongs of the past. From a policy perspective, it is a pragmatic strategy aimed at realising the country's full economic growth potential while helping to pull the black majority into the economic mainstream. For Warikandwa and Osode, the B-BBEE policy envisions the creation and development of new enterprises that produce value adding goods and services; attract new investments and employment opportunities with the aim of redistributing wealth and ensuring racial inclusivity in the economy. In that regard, it is argued that the amendments to the B-BBEE Act are a welcome reinforcement of the pertinent legal and institutional framework. If effectively implemented, the amendments should improve the current state of affairs in which fronting is widespread and BEE appears to be serving the best interests of only a small number of well-connected business elites. The duo proceed to argue that the 2013 Amendment Act systematically tackles some of the most critical challenges facing the implementation of the BEE programme and must therefore be commended as a sound legal instrument for advancing the inclusive participation of black people in the mainstream of South Africa's economy.

Critically examining matters of adultery in Namibia, Eugene Lizazi Libebe's chapter twelve notes that the position of Namibia's superior courts is that the courts will no longer award damages on a claim based on adultery for loss of consortium and contumelia. The reasoning of the courts in the judgements includes that this claim has lost its lustre in the "modern" day. The courts further argue that the

claim is inconsistent with Constitutional values and norms, therefore it is no longer sustainable in Namibian law. Libebe's chapter is an analysis of the courts' reasoning, and the implications of the judgments on customary laws, the family as a fundamental unit of society and African jurisprudence. It is argued that the courts failed to take cognisance of African history, customary laws, norms, values, morality, and philosophies. It is further argued that the interpretation taken by the court fails to protect the African family as a cornerstone and fundamental unit of society. Libebe suggests that the courts should rather craft a balanced and harmonious approach, instead of abolishing the claim in totality. The author also argues that the judgments have a potential to open floodgates for adultery, as well as undermine the fundamentality of the African family unit and the development of African family law or jurisprudence.

Tapiwa Warikandwa's chapter thirteen contends that the TAFTA is still at the stage of inception and so it may be premature to make definite conclusions as to whether or not there is space for a trade-labour linkage clause in its framework. He argues that this is especially so because NAFTA only established the NAALC several years after its commencement. Warikandwa holds that African countries should draw lessons from other trade agreements which have successfully incorporated a trade-labour linkage clause. He notes that the debatable successes of other regional trade agreements such as the NAALC, USA-Cambodia Textile Agreement and the USA-Chile Trade Agreement amongst others raise serious questions as to whether or not adequate effort is being made by policy makers in Africa to dedicate sufficient time and resources to research work which could guide them in making policy decisions informed by their societal contexts and demands. Completely disregarding a trade-labour linkage might not be plausible in the current era of globalisation. Warikandwa argues that this argument becomes more compelling if one considers that the 2012 Economic Report for Africa strongly recommended a change in the current approach taken by African countries towards human capital development.

Chapter fourteen is authored by Tapiwa V. Warikandwa, Artwell Nhemachena & Samuel K. Amoo. The authors argue that African values which manifest themselves in Unhu/Ubuntu are in

consonance with the values of the Zimbabwean Constitution generally and those of the Bill of Rights in particular. The human rights violations and indignities of the past have not served legitimacy and respect for Zimbabwean law well. The trio contend that the complete dignification of Zimbabwean law and jurisprudence would require considerable re- alignment of the present state of our African value systems. That way, coups such as the one which took place in Zimbabwe will be regarded as being contrary to our African value systems and therefore unconstitutional. The authors argue for ingenuity in finding and or creating law reform programmes, methods, approaches and strategies that will enhance adaptation to Unhu/Ubuntu values. The values of Unhu/Ubuntu, if consciously harnessed can become central to a process of harmonising all existing legal values and practices with the Constitution. Ubuntu can therefore become central to a new Zimbabwean jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance. Organisations such as the AU will now be seen to act in a manner that does not condone unconstitutional removal of presidents but in a manner that espouses constitutionality. For Warikandwa, Nhemachena & Amoo, a lot still needs to be done in this regard. Africa must decolonise its legal institutions and its laws and work towards a moral and collective pursuit of their society's best interests. Importing western notions at the expense of Africans is a recipe for disaster. Africa cannot afford any more coups which undermine the African development agenda.

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Beyond Eurocentric Human Rights Jurisprudence and Towards Animality? Humanoid Robots and the Decomposition of African Humanism and Personhood

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Much of what they did to us is documented and can be traced to archives and records in our possession and in the possession of the British Government. For example the colonial power set up a loot committee chaired by a judge to divide among the settlers cattle looted from the indigenous Africans and these records are there. The executions of our heroes and heroines were all recorded, including attempts by missionaries to effect conversions to Christianity at the last moment just before the executions were done (Chinamasa, 3 September 2001).

When the settlers arrived in the Cape, they used fire arms and horses to win wars, raid cattle and subsequently reduce the Khoikhoi to servants...When the settlers allowed their cattle to graze far afield, local members of the Khoikhoi or the san would not hesitate to seize them...Khoikhoi are reported to have looted more than 40 cattle from the settlers, albeit cattle that were probably stolen in the first place (SAHO, 13 March 1701).

Introduction

Considering Africans as indistinct from animals has for centuries been the ideology driving (neo-)slave drivers and (neo-)colonialists. Central to this ideology is not only the disruption and reversal of logics of precolonial African Ubuntu-informed human rights, but also the disruption of authentic African identities and genealogies that are central to African heritage claims. In other words, (neo-)colonialists know very well that for Africans to be able to claim their heritages, they need to assert African identities and genealogies. In this sense, (neo-)colonial assaults on African identities and genealogies is intended to diminish or erode African claims to

heritages, which the (neo-)colonialists also covet. The fact that Africans were literally hunted down [during colonialism and enslavement] like animals and then enslaved, trapped, shipped, prevented from getting married and forced to work on plantations wherein they owned no property, underscores the Westerners' treatment of Africans as animals and not human beings with human rights and human heritages. For this reason, to be regarded, as was done to Africans, as without human essence is in fact to be denied human rights and human heritages. In this regard, the Westerners did not necessarily originate human rights and humanness but they disrupted and reversed pre-colonial African Ubuntu-informed human rights which call for adoption and restoration particularly in this 21st century era in which Africa is afflicted with the new scramble for its resources. The point here is that although Westerners may have originated the terms human rights, it would be absurd to think that they also originated the logic underlying human rights. The coining of terms cannot be conflated with logics that are expected to be underlying them. Similarly, the possession of underlying logics should not be expected to map onto particular terms for human rights and humanness. In other words, translation ought to occur at the level of underlying logics rather than superficially at the level of languages wherein absence of some terms is erroneously understood in terms of zero-sum games. For this reason, the greatest mistake of Eurocentric scholarship is to think that what is universal is their Eurocentric human rights - in reality what is universal is the underlying logic of human rights and humanness which exist in all human societies including pre-colonial Africa. By saying that what has been historically universal is the underlying logic of human rights and not necessarily the terms human rights, we are arguing that Eurocentric scholars have so far been rather superficial in expecting the simplistic universalisation of human rights. Rather, they should have looked for the universality of the underlying logics of human rights and humanness that can exist even in societies with different languages. Instead of expecting to see observance to human rights, they should expect to see observance of the underlying logics of human rights or humanness which can exist in different guises and in different terminologies. To expect to see observance of human

rights, rather than the underlying logics, effectively translates to wanting to see observance of Euro-American etymologies – what unites human beings are not human rights but the underlying logics of human rights and humanness which existed for centuries in different societies. Critically analysed thus, human rights are not and can never be universal, rather, what is and can be universal are the underlying logics of human rights and humanness. Such underlying logics of human rights do not originate from Euro-America, in fact Euro-America has trampled on the underlying logics of human rights and humanness by (neo-)enslaving and (neo-)colonising other people across the world, dispossessing them, exploiting them, plundering their resources, perpetrating genocide on them, stealing their resources and property. Put differently, by treating other (neo-)enslaved and (neo-)colonised human beings as animals and as their beasts of burden, Westerners detoured from logics of human rights and humanness even as they thought themselves to be human and the champions of human rights.

The upshot of the foregoing is that deviating from Eurocentric human rights does not necessarily mean deviating from the underlying logic of human rights and humanness which have different etymologies in different societies. Since, as explicated above, Eurocentric human rights are particularistic, relativistic and not universal, decolonial jurisprudence needs to prioritise the underlying logics of human rights and humanness that are more universal – different histories and terminologies notwithstanding. Because to impose Eurocentric human rights amounts to what we call **human rights colonisation**, we argue for the need to work with the universal underlying logics, of human rights and humanness, that are less amenable to (neo-)imperial ideological machinations. Whereas Eurocentric human rights can be and are often imposed on other societies, a focus on the universal underlying logics of human rights and humanness is less amenable to imposition – it instead invites for negotiations and navigations of different terrains without prejudice. The point here is that whereas Euro-Americans who considered themselves to be the humans and to be originators of human rights, paradoxically considered other people as *tabula rasa*, their territories as *terra nullius* and their property as *res nullius*, empty

and unowned (Nhemachena *et al*, 2017), foregrounding the universal underlying logics of human rights and humanness would have prevented the colonisation of other human beings. In other words, the problem with Eurocentric human rights is that they disrupt and then deny the human essence of other (neo-)colonised and (neo-)enslaved people including Africans who are even denied the right to define their logics of human rights and humanness that should articulate into the universal logics of human rights and humanness. Denying African human essence while at the same time purporting to be originators and champions of “universal” human rights is an abiding paradox which resides at the core of Eurocentric human rights. In this regard, Africans have been articulated into (neo-)colonial Eurocentric human rights, that are erroneously assumed universal, and not into *a priori* universal underlying logics of humanness and human rights. In a context where Africans are denied not only their human essence but also their human rights to restitution, restoration and reparations for (neo-)enslavement and (neo-)colonial dispossession and exploitation, it is cause for consternation why Euro-Americans consider their Eurocentric human rights to be universal. Unless Africans can be understood as absent from the universe of the so-called universal human rights, the paradox cannot be resolved – in other words the [Eurocentric] universal human rights exclude Africans from the universe of humanity.

Assuming that Africans can only be human if they are appendages of Euro-American human rights, the Eurocentric human rights effectively mean that Africans cannot be human – an appendage to Euro-American humans cannot be human although it can possibly be half-human or three-quarter human and so on. Although an appendage may claim that it has human rights and can claim its human rights, the reality is that it can only claim human rights for the masters of which it is an appendage – the human rights are not its own because it is effectively not human or it is not a complete human. Being appendages of Euro-American human rights, Africans are paradoxically denied human rights even as they are made to believe that they are granted humanism. Like former slaves, appendages can only be half or three-quarter human and not

complete human beings (Ughanze-Onyeagocha, 2010) – full citizenship and full rights in the world belong to full-humans and not to three-quarter [African] humans deemed to be without or lacking human essence. Both African men and women are effectively turned into three-quarter humans in a world where they are appendages of the Euro-American regimens.

While other scholars have posited that Eurocentric human rights are associated with individualism deemed contrary to African Ubuntu collectivism, we hold that this postulation is as simplistic as it is erroneous. Euro-Americans are not individualistic – when they colonised Africa they did not do so as individuals, they came to Africa as bands; they divided up Africa in Berlin as a collectivity; they were also backed by their metropolitan states when they colonised Africa; currently Euro-Americans are united in the sense that they have the United States of America and the European Union even as Africa is struggling to set up a United States of Africa; the Euro-Americans belong to the North Atlantic Treaty Organisation (NATO) whereas Africans haven't got such an organisation to pull its armies together; Euro-Americans are also united in the United Nations Security Council. All these instances render simplistic the postulations about Euro-Americans being individualistic as opposed to Africans being collectivistic. Eurocentric systems include organisations, corporations and institutions to collectively protect even the proceeds from (neo-)colonially dispossessing, looting and robbing Africans – they are not necessarily individualistic. While Africans are expected by the Euro-American systems to enter human rights terrains without their African cultural baggage, Euro-Americans have the privilege to be considered as humans and to have human rights without necessarily having to shed off their Eurocentric cultures and traditions first. The point here is that African three-quarter humans are deemed to require trimming [of their cultural and other baggage] before they can become three-quarter humans and be accorded Eurocentric human rights. In other words, Africans ironically have to be animalised, deconstructed and decomposed before they can be deemed to be “humans” and to be eligible to claim Eurocentric human rights.

Critically addressing human rights jurisprudence and the (neo-)colonial animalisation of Africans, this chapter examines the phenomenon of humanoid robots, technoscience, animism and ways in which they are used to deconstruct and decompose African humanism and personhood. The chapter argues that Eurocentric human rights have failed to humanise Africans – in fact they were never meant to humanise Africans who have remained underdogs in a (neo-)imperial world which regards Africans as unworthy of humanely restitution, restoration and compensation for (neo-)colonial dispossession. The chapter argues that, as evident in contemporary resuscitations of colonial discourses of animism, postanthropocentrism, ecocentrism or gaia, Africans continue to be regarded as animals. They continue to be regarded as indistinct from animals - unfit for owing and controlling property and resources but fit for the provision of beastly labour power at no cost or for next to nothing to the (neo-)imperial masters. Thus, the chapter argues that the deconstruction and decomposition of African Ubuntu-informed humanism and personhood started during the enslavement and colonial eras and continued up to the present (neo-)colonial era wherein discourses about decentring the human beings, moving beyond human exceptionalism and moving beyond anthropocentrism are being popularised. It argues that for Africans, the problem since the enslavement and colonial eras has not been one of presence of African anthropocentrism or humanism but it has been a problem of erasure, disruption and destabilisation of African humanism and anthropocentrism. Enslavement and colonisation cannot, for Africans, be characterised in terms of humanism and anthropocentrism – it instead amounted to denial of African anthropocentrism and humanism. Therefore, the decolonial moment should include restoration, restitution and reinstatement of African humanism, materialities and anthropocentrism. Animism, ecocentrism, postanthropocentrism and posthumanism would merely repeat the (neo-)colonial and (neo-)enslavement depiction and treatment of Africans as three-quarter humans that are indistinct from nonhuman nature including beast of burdens.

Humanism, Posthumanism and African Ubuntu/Chivanhu

Scholars who conceive decolonisation not in terms of deimperialisation but in terms of decolonising, decomposing and deconstructing African bodies (Young *et al*, 2005), postulate animism and posthumanism and transhumanism as the current theories –all of these theories have huge implications for Ubuntu jurisprudence including ethics and morality. In a contemporary context where discourses of animism and posthumanism are being resuscitated and popularised (Nhemachena, 2016; Garuba, 2013; Braidotti, 2012; Haraway, 1991), it is noted that humanities and humanisms are in crises (Braidotti, 2012). For Braidotti (2012) humanism entails moral expansion of human capabilities, the idea of teleologically ordained, rational progress, faith in the unique, self-regulating and intrinsically moral powers of human reason, the idea of Europe as a site of origin of critical humanistic universal reason, ethical behaviour and self-reflexivity. Whereas Braidotti (2012), on one hand, considers Europe to be associated with the origin of ethical behaviour and moral reason, on the other hand, Nietzsche (Hill, 2006; Nietzsche, 2003) urges Europeans not to be ethical but to be selfish so that they could subjugate and sacrifice other people, including by pretending to be compassionate (Hill, 2006; Nietzsche, 2003). In fact for Nietzsche, who wrote in the 1800s – about the time Europeans were colonising Africans, Europe did not need the dichotomies or binaries between good and evil, immorality and morality: Europe needed to craft order out of chaos which would enable European supermen to arise (Nietzsche, 1997; Hill, 2006; White, 2010; Nietzsche, 2003). In this regard, (neo-)enslavement and (neo-)colonisation are not hinged on humanism or anthropocentrism in so far as they dispensed with humanistic sensibilities of morality, ethics, law and justice. Thus, the calls for adoption of posthumanism, animism, postanthropocentrism, ecocentrism and transhumanism (Braidotti, 2012) effectively translate to intensification of (neo-)enslavement and (neo-)colonial animalisation and denials of the underlying logics of humanism and human rights.

While Africans are anxious for resuscitation of their Ubuntu-informed human rights and personhood, there is conversely the

promotion of posthumanism including humanoid robots and animism that are set to derail struggles for recognition of Ubuntu – informed rights. Humanoid robots are described by some scholars as having human sentient traits, action, reproductive capacities, predictive capacities, learning capacities, understanding, interpretive, analytic, perceptual, sensual, subjectivity, human intelligence, capable of executing rational, independent and responsive action (Saripan *et al*, 2016). For the European Union humanoid robots are becoming electronic legal persons and set to replace human beings in employment (The Guardian, 12 January 2017; Saripan *et al*, 2016; Jones, 2015). While rationality in Eurocentric jurisprudence is deemed to be linked to robots’ goal achieving mechanism (Saripan *et al*, 2016), we argue here that rationality should not be merely based on goal achievements but also on morality, ethics, justice and legality. Apart from the fact that the humanoid robots are taking over human employment resulting in mass unemployment (The Guardian, 12 January 2017), we note that rationality that is not connected to morality, ethics, justice and legality is reminiscent of colonial and enslavement rationality that was preoccupied with goal achievement regardless of moral and ethical consequences.

Arguably, as an extension of the long-standing antipathy for African human reproduction, the creation and proliferation of humanoid robots, which are being quickly granted personhood and human rights (Saripan *et al*, 2016; Jones, 2015; DeBaets, 2010; Wurah, 2017; Bodley, 2015), will reduce the African human population. In fact, there are some arguments that humanoid robots will in future become children just like biological children that human beings have: already in countries where there is declining birth rate and aging populations humanoid robots are being embraced [even as there is xenophobia against human foreigners] to provide care in institutions (Bodley, 2015; Robertson, 2014). Therefore, paradoxically in a context where there is intensification of efforts to control and reduce African human population, there is the creation and proliferation of humanoid robots. In this regard, we contend that efforts to proliferate and populate the world with humanoid robots and animated objects are in fact premised on mere antipathy to the proliferation of African human bodies. Thus, the aim to produce

thinking humanoid machines encompassing all human knowledge and the conferment of constitutional rights to personhood for humanoid robots (Saripan *et al*, 2016; Jones, 2015; DeBaets, 2012; ter Wijlen, 2017), are in fact minded on replacing humanity with humanoid robots. While it is contended that the notion of legal or electronic personhood [as opposed to natural personhood] is already legally recognised for corporations or companies and other nonhuman subjects (Saripan *et al*, 2016; Bryson *et al*, 2017; Jones, 2015), we contend that a decolonial jurisprudence needs not be premised on such justifications. Legal persons in the form of transnational corporations, as did their forerunner colonial era chartered companies, are wreaking havoc dispossessing, grabbing African land and other property and resources as well as exploiting Africans. The point here is that the fact that a corporation or company is already recognised as a legal person does not necessarily make it decolonial – in the same sense, if humanoid robots are recognised as legal persons, it does not mean that they therefore suit the decolonial jurisprudential agenda.

It is contended by other scholars like DeBaets, (2012: 2) that humanoid robots are embodied, sociable, situated in their environments, mirror humanity and embody spirituality that also characterises human personal life. However, some scholars have noted that humanoid robots will destabilise and disrupt human rights theories (Wurah, 2017). We argue here that the human rights theories, including natural theory, protest theory, discourse theory and deliberative theory (Wurah, 2017), that scholars argue to be disrupted and destabilised are Eurocentric in the sense that they do not encompass the Pan-African exigencies of restitution, restoration and compensation for (neo-)enslavement and (neo-)colonial dispossession, plunder, looting and exploitation. We contend that Africans have not merely been marginalised and oppressed by (neo-)enslavement and (neo-)colonisation – rather they have been plundered, robbed, exploited and dispossessed and these are the crimes that a decolonial Pan-Africanist jurisprudence needs to address.

Reminiscent of Luddite machine breakers in 19th century England, contemporary humans that oppose the creation of

humanoid robots, which are taking away their jobs, are summarily condemned as neo-luddites. On the other hand, it is noted that humanoid robots, posthumanism and transhumanism are set to erase [African] humanism and humanity. In this regard, Wurah (2017: 68-70) argues that:

The advent of transhumanism, just like the advent of robots, put the future of human rights in serious jeopardy...What seems to emerge from the transhumanist School is that for the post-human, the notion of humanity would fall short if strictly defined in biological terms. It would no longer be clear whether the cyborg would be justified in claiming the values of “human dignity” and ultimately human rights. Many core ideas of human rights seem in conflict with transhumanism...Transhumanism implies that there is no need to preserve life, human dignity means human beings are unique and irreplaceable – transhumanism implies that certain aspects of the human experience like memories can be readily replaced with technologies...it seems antithetical to anticipate the granting of human rights to creations born out of the human mind when actual humans are being denied those rights.

Although other scholars (Pable, 2017) celebrate the fact that there will be, in future, boardroom meetings with humanoid robots, we note that humanoid robots will in fact result in great existential angst, including ontological insecurity, for Africans. The fact that mining companies, banks and governments including in Africa (The New York Times, 5 March 2018; Reuters, 21 June 2016; Wallach, 2011; Murashov *et al*, 2017; Robertson, 2007; Robertson, 2014; Eaton, 2015; Mining Weekly, 9 February 2018; Business Report, 5 March 2018), are already employing robots means that Africans who have been (neo-)colonially dispossessed and exploited [without restitution and restoration] will also lose the jobs that currently sustain them. The import of this point is that while transnational corporations, are busy grabbing African land from peasants in the contemporary new scramble for Africa (Nhemachena *et al*, 2017), humanoid robots are also being created and deployed to take jobs away from the Africans. Thus, needed in Africa are studies of

expectations, studies of the future or studies of anticipation (Groves, 2017; Selin, 2008; Brown *et al*, 2010), that would allow Africans to anticipate their future in a world that is increasingly populated by humanoid robots and transhumanists. Having been dispossessed and robbed of their land, knowledge, human identities and livestock, Africans will sadly not be able to avail jobs which will go to humanoid robots instead. In this regard, we note that one of the fundamental challenges in decolonising African jurisprudence is the dearth of abilities to anticipate futures – African academics do not have disciplines or field on Sociology of Anticipation, Sociology of Expectation, Sociology of the Future, Anthropology of Anticipation, Jurisprudence of anticipation, jurisprudence of the future or jurisprudence of expectations for example. These fields are extremely important particularly for a continent that has for centuries been understood principally in terms of the past even as its future is also being stolen.

Thus, persuaded to think that their future lies in employment within transnational corporations, NGOs, civil society organisation, in governments and other entities, Africans are conveniently steered away from reclaiming their land, livestock and reparations from (neo-)colonial dispossessioners. However, the majority of Africans are not yet aware of the build-up and proliferations of humanoid robots that are taking away the jobs that constitute the last hope for the dispossessed who are now set for extinction in the emergent Anthropocene (Nhemachena *et al*, 2017). Much as (neo-)colonisation is celebrated by some, including Africans, as civilisation and progress, the risk is that if Africans continue lacking faculties of anticipation or expectations of what the future will be like within the context of current changes, the continent will remain doomed.

Taught to erroneously believe that their ancestors lie in the [(neo-)colonially distorted] past, which they are often urged to glorify, Africans are effectively dissuaded from studies of the future, studies of anticipation and expectations. The problem being underscored here is that while African youths are celebrated as the future leaders of Africa, they have been made to believe that Africa and its ancestors only inhabit the past and so without anticipatory decolonial studies of the African future, the youths do not see or envisage any future

that is Pan-African. Increasingly engineered to become transhumans, posthumans and cyborgs, African youths will increasingly become three-quarter human appendages of global (neo-)imperial networks – in other words, they will lose their African human identities and become nonhumans that cannot claim African heritages. Underscoring the imperative of possessing faculties of anticipation, Selin (2008: 1879-1880) writes thus:

Technologies not only intervene in present realities, they also create future realities, both symbolically and materially. The rhetoric that surrounds nanotechnologies produces imagined futures, while concrete technological practices have the power to produce very real futures materially...This ability to not only imagine technologies but also produce technological futures is not matched by our scholarly – or practical - understanding of what kind of socio-technical systems we are creating...foresight practitioners are interested in indicators of the future, or what I call anticipatory knowledge. Anticipatory knowledge adds the temporal dimension to knowledge forms and practices and brings to the fore the transient, locally defined, and multiple nature of knowledge.

While decolonisation and decoloniality would be premised on an Ubuntu that can be delimited, other scholars like Ajana, (2008) argue for identities that are open dynamic, irreducible and therefore not definable as African. The decolonisation of Eurocentric human rights is understood in terms of re-contextualisation of human rights theory, provincialisation of human rights, parochialising legal theory, construction of a cosmopolitan jurisprudence, dialogue between different traditions and rationalities, the globalisation and transnationalisation of human rights (Barreto, 2012). We add herein that decolonisation has to be also premised on reversing coloniality and (neo-)colonisation through restitution, restoration and reparations. Decolonisation of jurisprudence cannot be achieved merely by hybridising jurisprudence (Nurso, 2017) because hybridisation is in fact a process [similar to colonial processes of incorporation and assimilation] of cannibalising, assimilating and distorting the identities of the others.

While scholars like Svirsky (2012) argue for a type of decolonisation that does not entail the retrieval of the authentic past, we argue - to the contrary – for the need to restore, restitute and compensate the (neo-)colonial African authentic owners of the properties and resources that were looted, stolen, plundered and exploited since the colonial and enslavement eras. If (neo-)colonisers are demanding via colonial pacts compensation for colonising and enslaving Africans (Nhemachena *et al*, 2017) and for supposedly developing African land, we wonder why Africans must not also retrieve their authentic past and claim compensation, restitution and restoration of it. Whereas others have argued that the idea of property is fundamental and foundational to modern industrialised economies (Crabtree, 2013), we contend that property is equally fundamental and foundational for Africans who were dispossessed and robbed during the (neo-)colonial eras. Deep decolonisation would involve restoration, restitution, reparations and reconstitution of indigenous people's nation-state sovereignty, materialities, self-determination and autonomy (Allen, 2014). Contrary to Eurocentric scholarship that presupposes that precolonial indigenous people did not have states (Bradely *et al*, 2005), we hold that decolonisation has to include restoration of materialities and reaffirmations of African state sovereignty and autonomy which were destroyed during the colonial era (Pambazuka, 25 September 2005; Palmer, 1977; Nhemachena *et al*, 2017).

Instead of conceiving decolonisation as deimperialisation including restituting, restoring and compensating African victims of (neo-)colonial dispossession and exploitation, Eurocentric scholars are focusing on decolonising African bodies. Rather than restitution, restoration and reparations being paid to (neo-)colonially dispossessed Africans, Eurocentric scholars focus on liberalising sexuality - conceivably so that Africans and other (neo-)colonial victims can entertain themselves with (neo-)liberal sex and forget to reclaim their stolen heritages (Nhemachena *et al*, 2017). Rather than organise as many conferences as possible on restitution, restoration and reparations, what we see are innumerable conferences including on marginalisation, oppression, domination, underdevelopment, poverty, liberal freedoms including artificial sex and so on (Mirror,

21 October 2016). Preferring to liberalise sexuality rather than to reconstitute, restore and compensate African victims of (neo-)colonial dispossessions and exploitation, (neo-)empire chooses to create, proliferate and deploy humanoid sex robots, sex toys, including dildoes, teledildonics, virtual sexuality, sex at a distance with cybersuits and using virtual sex machines, VR gear including lenses, USB-connected sex toys, vibrating underpants remotely connected by iPhones and so on (Boden, 2006; O'Donnell *et al*, 2012; Viano, 2018; The New York Times, 24 December 2013). A wide range of innovations are designed for commercial sex, postmodern sex, virtual sex worlds, remote sex, robot sex, interactive sex over the internet, online sex with full immersion sex suits to transmit sensations between partners and to make it possible to beam the other person into bed for remote sexual activity – in fact hotels are set to have bed sheets and sleep wear with special fibres for sensory responses (Viano, 2018; The New York Times, 24 December 2013). The mechanics and dynamics of the extreme liberalisation of sex are underscored by O'Donnell *et al* (2012: 35) thus:

Essentially what this entails is an individual connecting a piece of apparatus to their computer so that other people can control it remotely. In this way a gentleman in Los Angeles can manoeuvre himself into his preferred piece of equipment, go online and invite a stranger in Hong Kong to engage with him. The latter uses his, or her, computer to control the speed and intensity at which the gadget moves and stimulates. If both have the same device there is scope for mutual satisfaction...New techniques for corrupting the innocent use of computers will evolve as the cyber-environment expands. The potential for the internet's services to be misused by individuals in their pursuit of sexually deviant interest is a longstanding cause of concern. More specifically, the use of the internet to exploit children sexually presents parents with a growing number of fears. Because the internet has become mainstreamed within schools and colleges and commonplace within homes, and because children readily adapt to new technologies, the attraction, to those with sexually deviant appetites is obvious.

The fact that the extreme sexual liberalisation is intended to provide opium for the dispossessed, and exploited in the world is underscored thus:

The Fourth industrial revolution promises to unleash all sorts of dark visions upon society: mass unemployment and social unrest from automation, the Internet of Things spying on everything we do, babies gently rocked to sleep by machines...As we whittle away our obsolete lives as technology zooms past human capabilities, those unproductive hours should at least be enjoyable, thanks to lifelike androids fitted out for machine-precise sexual proficiency, teledildonics allowing long-distance partners to pleasure each other from across the world, and virtual reality interactions that will make low self-confidence, physical impairment or even the laws of physics no obstacle to realising one's fantasies (The Guardian, 5 April 2017).

Thus, cancelling out the Godly idea that human beings should own resources and property and also work for survival; and circumventing the Godly injunction that a human being should get married to a member of the opposite sex, humanoid robots are argued by some scholars to constitute tools for Satanic transgressive freedom. It is argued that the satanic transgressive freedom is intended to allow human beings variety in sex lives and to provide them with opportunities to indulge their fantasies to the fullest (Johnson, 2017). Taking over and replacing the ideas of humanity and God (Leenes *et al* (2014), humanoid robots are replicating (neo-)imperial preference for Ubuntuless nonprocreative sex and loathing for African human heterosexuality (Maylam, 2005: 22).

It has been argued that Ubuntu encompasses morality, ethics and jurisprudence which are anchored in humanistic community, family, interconnectedness, communal harmony, universal human interdependence, humanness, solidarity, empathy, non-racialism, non-discrimination, respect for freedom, dignity of people, forgiveness, love, moral virtues, etiquette and principles; normative personhood (Letseka, 2013; De Beer, 2015; Mokgoro, 2012; Arthur *et al*, 2015; Johnson *et al*, 2016). On the other hand, Aldrich (2008) notes that some Euro-Americans whose homosexuality did not fit

their own societies' mores migrated to Africa and other colonies, where they spread their homosexual inclinations. While Ubuntu is humanistic and concerned about the reproductive ethical and moral functions of marriages and families, some scholars would want to portray Ubuntu as open, unfixed, irreducible and adjustable (van Hensboek, 2011). In fact, there are some scholars who would want to dismiss Ubuntu as hopelessly vague and therefore that Africans should not be fixated with their heritages (van Hensboek, 2011). Considering Ubuntu as open-ended and embedded in irreducibility of the other effectively serves to open it up to perversities – in fact considering Ubuntu as open-ended and irreducible amounts to cancelling it out: if it is open-ended and irreducible then it means that it does not exist as a thing – it means it is nothing because for something to exist it has to have boundaries and borders that can be demarcated. If Ubuntu is open-ended and irreducible, it effectively means that there is neither morality nor ethics, nor laws, nor jurisprudence in it – it is made to fizzle into nothingness. The point here is that portraying Africans and their Ubuntu as open, dynamic, irreducible and so on amounts to saying that they are nothing, it also amounts to pre-empting African struggles for restitution, restoration and reparations for their resources and properties. The law requires clearly identifiable legal subjects, it does not require fuzzy, irreducible, open-ended subjects that cannot be delimited or identified.

The Euro-American assumption that pre-colonial Africa was open, irreducible, empty and therefore unowned is being repeated in some theorisations of Ubuntu in terms of irreducibility, open-endedness, dynamism and so on. In this regard, we note that not only is Africa [presumed to be open and empty] currently a victim of the dumping of e-waste and other rubbish from Euro-America but historically Africans and other colonies were deemed to be open, empty and dynamic dumping grounds for European criminals or convicts (Independent, 18 February 2009; Lepawsky *et al*, 2010; Mail Online, 25 July 2007; Farrelly, 2017; Martin, 1975; Rushton *et al*, 2003). Criminals were historically transported or shipped to the colonies such as Australia, America, New Zealand, Africa and so on precisely because these colonies were regarded as open, as

irreducible, empty, dynamic enough to accommodate the criminals and so on. In this regard, colonially Africa has been regarded as open-enough to accommodate people like Cecil John Rhodes the arch-imperialist son of a Bishop who was also a homosexual with interest in young boys (Independent, 27 July 1996; Schaeper *et al*, 2010; The Telegraph, 4 March 2001). Thus, although he considered Africa to be open, empty and irreducibly belonging to Africans, Cecil John Rhodes set up his own empire in Africa and even proceeded to set up his secret society (Mail & Guardian, 13 November 2015) on a continent that he assumed to be open. Considered to be open, dynamic, empty and blank slates, Africans are enjoined by (neo-)empire to constitute sacrifice in celebration of historical imperial homosexual figures. Thus, it is noted that:

If sexual repression fuelled British expansion, isn't it time we saluted the role and sacrifices of our homosexual adventurers?...I am wondering, because February is lesbian Gay Bisexual Transgender (LGBT) History Month, and ...a perfect candidate to be reclaimed as an untold story of our non-straight heritage. Major-General Sir Hector Macdonald was one of the greatest heroes of the British Empire, who was virtually airbrushed out of popular consciousness after a homosexual scandal in 1903 (The Guardian, 10 February 2010).

When (neo-)colonial governments, missionaries, NGOs, academics and civil society organisations are critical of African families, marriages and institutions which do not permit homosexuality (Stanto, 2012; Guyo, 2017; BBC News, 9 November 2012; Mangena *et al*, 2013; Independent, 10 July 2016), it is necessary to critically examine the real motivation for forcing Africans to adopt and legalise homosexuality. In fact, there are observations that human beings are being wittingly and unwittingly chemically engineered, by some transnational corporations, to become homosexuals. Chemicals that feminise men, change the hormones for men and women, castrate men, transform men into hermaphrodites, reduce levels of testosterone, damage sexual organs, shorten penises and cause sex reversals are argued to be laced into food, environments, water and so on (Natural News, 16 January

2017; Strakosha, 2017; Natural News, 20 February 2014; Hood, 2005; Ahearn, 2010; Zala *et al*, 2004; Nhemachena and Mawere, 2017). Thus, when Africans are sanctioned by Euro-American states or forced by NGOs, “civil society organisations” and the United Nations to legalise homosexuality, it is imperative to question the logics and motivations of the pressure applied on African states (Van Klinken, 2013). In this regard, it is important to notice that (neo-)colonialism has always required Africans to become scapegoats for (neo-)imperial sacrifice (Sachdeva, 2015; Nhemachena, 2016). (Neo-)colonialism, can as Hill (2006) underscores, beautify itself by camouflaging and doctoring what is naturally offensive, repulsive, horrible and dangerous in order to make it presentable, palatable, digestible, appealing and tempting so as to entice people into the realm of its [new] logic. In this regard, (neo-)colonialism had to camouflage its repulsive logics and grammar by pretending to liberate African women from patriarchy, from human rights abuses, from the payment of bridewealth, from polygamy, from traditional beliefs and rituals (Mangena *et al*, 2013; Von Struensee, 2005; Chireshe *et al*, 2010; Chinonyerem, 2014; Mittlebeeler, 1976; Mudavanhu, 2010). Even as African men and women were paradoxically being dispossessed of their land, livestock, knowledge systems, religions, epistemologies and so on, the (neo-)colonialists pretended to civilise, liberate and free African women and men from their supposedly repressive and oppressive cultural practices.

Thus, during and after the colonial dispossession and exploitation of Africans, (neo-)colonialists who dispossess Africans of their land present African culture as the arch-evil. This was precisely because African young men, who could not marry because cattle for their bridewealth payments were looted, had to be assuaged via ideologies that portrayed African culture of paying bridewealth as unnecessary. Colonialists had to mollify African young men who would otherwise have endured long struggles against the colonialists’ seizure of the cattle that were earmarked for their bridewealth payments. Similarly, African young women who were affected by the colonial seizure of African cattle needed to be consoled and the (neo-)colonialists simply had to concoct ideologies that condemned African culture of paying bridewealth so that the African young

women would not blame the (neo-)colonialists for their unmarried statuses. Instead of restoring or restituting looted African resources including cattle, so as to re-enable African marriages, (neo-)colonialists have decided to condemn marriage payments and to urge African boys and girls to forget about concerns of purity including virginity [in literal and metaphorical senses]. In this regard, (neo-)colonialists managed to play off African youths (both young men and women) against the African elders who continued to expect bridewealth in a context where the (neo-)colonialists had seized the African cattle that would have been used for marriage. So, (neo-)colonialists shifted the blame for failure of African marriage systems on marriage payments even as they, particularly colonial native commissioners, also raped African girls and women with impunity and without having to pay damages, marriage payments or for the upkeep of the offspring (Nhemachena and Mawere, 2018). We argue that such a development prompted a shift from morality to immorality amongst desperate African youths, hence a rampant increase in fornication and adultery on the continent. In the same way (neo-)colonialists had to blame African systems of polygamy as a bad cultural practice because the existence of polygamy meant that Africans would need more cattle for marriage payments – and the same (neo-)colonialists had looted the African cattle. (Neo-)colonialists had to find ways to shift attention from their looting of African cattle and land – rather they preferred to make Africans blame and fight one another for failure to get married and failure to provide sustenance. If polygamy remained popular among Africans, Africans would have remained angry and warlike towards (neo-)colonialists who had looted their means for marriage payments. In short, the problematisation of marriage payments, polygamy and rituals of African marriages was not meant to liberate African women, girls, boys and men – it was meant to liberate (neo-)colonialists by defusing African frustration over the looting of their means for marriage payments. Put in other words, (neo-)colonialists, who not only introduced oppressive systems but also perpetrated crimes of theft, looting and robbery against African men, women, girls and boys, could not have sincerely wished African women to be

liberated and freed from the supposedly oppressive African cultures – it was just a (neo-)colonial sleight of hand.

Although it has been argued that polygamy forced African women to live in poverty and that children had to fight for inheritance and to share the resources (Von Struensee, 2005), we argue that this argument is not plausible. If (neo-)colonialists were sincerely concerned about the impoverishment of African women and children because of the sharing of and struggle for resources in polygamy, the colonialist would not have looted the African resources in the first place. The point here is that (neo-)colonialists who looted African resources could not have been sincerely concerned about the downsides of sharing and splitting of resources within polygamous marriages. If they were genuinely concerned about the inadequacy of African resources within the polygamous marriages, they would have desisted from looting African cattle and land. In other words, colonialists who stole African land, cattle and other resources could not have sincerely been concerned about the supposed failures of African institutions to cater for African women and children. We therefore argue that colonialists' concerns about African marriage rituals, fertility rituals, marriage payments and polygamy could only have been explicable in terms of the interests of the colonialists which were against African fertility, population increases and African heritages. Deprived of their cultural identities which continue to be watered down, Africans cannot safely claim to be Africans, and without such identities they also weaken claims to their African heritages. Similarly, contemporary Eurocentrists' concerns about human rights abuses, violence, injustices and so on in Africa are paradoxical in the light of the impunity of Euro-American states and corporations that continue to perpetrate, with impunity, human rights abuses on Africans (Koenid-Archibugi, 2004; Zubizarreta *et al*, 2016; Global Research, 10 November 2016; Jonge *et al*, 2017; Hummel, 2005; Rubin, 1995; Teitelbaum, 2007; Fouchald *et al*, 2009; Breedon, 2015; Luban, 2011; Tienssen, 2016; Pah *et al*, 2009; Martin-Joe, 2011; Schnobel, 2014; Deva, 2004). Thus, Zubizarreta *et al* (2016: 42-92) note that:

International institutions and multilateral bodies...have opted to continue backing the logic of voluntarism and self-regulation...rather than introducing effective mechanisms for making large corporations respect human rights...Thus, many multinationals charged with violating human rights, not respecting workers' rights and engaging in corruption may enjoy the endorsement of the United Nations...thanks to being full members of the Global Compact. And this also allows them to influence economic policy in poor countries, as their link with the UN gives them direct access to governments and multilateral bodies...The doors of the United Nations have for years been wide open to transnational corporations, which are referred to as "stakeholders", following the general trend of handing over decision-making power to large economic and financial conglomerates in preference to states, governments and civil society in general...By definition, multinationals...defend only their private interests – especially those of their majority shareholders – and not the general interest and for this reason they should not be allowed to participate in a process in which they would be both judge and party.

The same transnational corporations sponsor destructive extreme liberalisation programmes in African economies, families, marriages, cultures, societies and polities. Granting absolute sexual liberalisation including prostitution, adultery, homosexuality, sodomy and bestiality is not necessarily intended to free the Africans – it is intended to disrupt and destabilise African genealogies, identities and heritages which would otherwise be relied upon to reclaim restitution, restoration and reparations. With homosexuality, and bestiality, which are being promoted in Eurocentric discourses, Africans cease to be reproductive. With the emergence of humanoid sex robots, Africans cease to have reproductive sex and also because some of the contemporary technology also causes cancer, sterility and infertility, African populations will go down. Contemporary technologies including smartphones, Androids, scanners etc. cause several problems including cancer, loss of fertility, damage to DNA, reproductive death, mutation, chromosomal rearrangements, abnormalities, cataracts, loss of sperm quality, damage to human immune systems and interference with genomic integrity (Rastogi *et*

al, 2010; Regele *et al*, 2004; Global Research, 16 December 2017; Naeem, 2014; Goldworthy, 2012; Natural Society, 16 May 2012; Sutton, 1985; Richards *et al*, 2010). With the condemnation of the logics of sexual purity including virginity tests, Africans will then be more easily persuaded to marry humanoid sex robots which do not have to possess virginity. If sexual purity including virginity tests [in both literal and metaphorical senses] continued to be prized in African cultures, then it would be difficult for transnational corporations to convince Africans to marry humanoid sex robots. If Africans continued to prize their marriages including the payment of bridewealth to parents-in-law, then transnational corporations that are producing humanoid sex robots would not get clients. In other words, the intention of (neo-)empire is to ensure that instead of Africans paying bridewealth to parents-in-law, they will instead pay “bride price” to manufacturers of humanoid sex robots that are set to replace human marriage partners. In this regard, African men and women will have to buy their humanoid sex robots. Because men and women can buy their humanoid sex robots, (neo-)empire would market the robots by arguing that the humanoids help resolve the supposed challenges of patriarchy.

Thus, whereas the Shona culture prized sexual purity including virginity testing, abstinence and faithfulness even to deceased spouses (Mudavanhu, 2010; Posselt, 1935; Mutswairo, 1996), the Eurocentric ideologies encourage Africans to practise sexual liberalism including fornication, adultery, prostitution and homosexuality. Whereas Shona culture valued procreative marriages and sexual relations, Eurocentric ideologies urge Africans to indulge more in homosexuality, sex with humanoid robots, ecosex, bestiality and other forms of nonprocreative sex. Whereas the Shona and other African people value marriage payments including bridewealth (Mudavanhu, 2010; Chinonyerem, 2014; Chireshe *et al*, 2010; Jones, 2011), Eurocentric ideologies discourage the payment of bridewealth even as humans are paradoxically being urged to buy humanoid sex robots. Thus, whereas for the Shona people, incest, homosexuality, bestiality would be considered vices (Mudavanhu, 2010), Eurocentric ideologies urge Africans into homosexuality, incest, ecosex and bestiality. Whereas Africans considered the process and rituals of

marriage to be communal, to involve the two families of the partners, and to involve drawn out processes or stages (Mudavanhu, 2010) Eurocentric ideologies dissuade Africans from such rituals, drawn out marriage processes and involvements of the communities and families – in fact the ideology of liberal sex prioritises the individual's sexual inclinations, feelings and decisions. In the same way, the buying of humanoid sex robots will be simplified, without the involvement of the two families of partners – in any case, the humanoid sex robot will not have a family of its own behind it to participate in the marriage rituals. This is part of the reason why Eurocentrism would prefer simplified, individual centred marriages and sexual relations – simplifying them would create room for humanoid sex robots. While lesbians and gays would try to champion the notion that biology does not set a standard for everybody (Ottenheimer, 2001), the Shona prize procreative sex that is considered to carry the society and genealogies forward. Whereas lesbians and gays, posthumanists, manufacturers of humanoid robots, manufacturers of reproductive technologies would oppose biological kinship, genealogies and reproduction (Ottenheimer, 2001), the Shona prize biological kinship that is also central to genealogies and heritages. Eurocentric liberalisation has more to do with commercialising sexual relations and the profit motives of global hegemonic transnational corporations, than with freedom, emancipation or liberty of human men and women, which fund projects to destroy African culture and the order that the African cultures undergird.

In the light of Eurocentric critiques on African heritages, identities and genealogies that legitimise African inheritance (Ingold, 1995; Hutson, 2009; Ingold, 2012), scholars are increasingly problematising [African] genealogies, identities, and heritages. Clear and indisputable African genealogies and identities are considered [by Eurocentric scholars] to exclude Euro-Americans from enjoying African resources and properties. Ingold (2000: 137) writes thus:

Efforts to accommodate the real complexities of genealogical connection within essentialist categorisations based on the sharing of substance through descent have invariably led to the endless

ramifications of ever finer lines of discrimination and exclusion whose imposition – which may have real consequences for those affected in terms of access to resources and arenas of decision making – appears increasingly arbitrary.

In other words, instead of Ubuntu-informed ethics and morality, some scholars would instead advocate for kinds of thinking and behaviour that defy African pre-established genealogies, heritages, identities, conduct and laws. For instance, Shepherd (2014) notes Derrida's argument that moral behaviour entails a move into an abyss of madness, into the experience of undecidability; for Derrida, human duty is not to laws and ethical duties – for him ethics is about personal encounters with particular or singular individuals. Such a Derridean understanding of ethics expressed not in laws, maxims and procedures, but rather embedded in and shaped by actual physical encounters with the other, is contrary to Ubuntu ethics, morality, justice and laws. Whereas Derrida argues for ethics which resist certainty and graspable categories (Shepherd, 2014), Ubuntu ethics, jurisprudence and morality call for certainty and graspability of identities of the parties to disputes. With respect to African marriages – it is absolutely necessary for parties to grasp the identities of their partners and children - partners and parents do not have to be afflicted by undecidability and ambiguity. Undecidability, openness, dynamism and ungraspability would explain deviant and punishable types including adultery, prostitution, homosexuality, bestiality, incest and so on.

We argue here that in a predatory Eurocentric world that values openness of the others for penetrations of various kinds, virginity [in both literal and metaphorical senses] would be deemed purist, anachronistic and archaic because (neo-)empire strives to penetrate not only open nations and continents but bodies of individuals also. Insistence on openness is not necessarily liberating for the penetrated one - indeed penetration is often punitive, destabilising and disruptive. As (neo-)empire hunts for as many openings and orifices in the world as possible, it is impelled to sponsor sexual liberalism including homosexuality, incest, bestiality, prostitution and adultery – the underlying logic in these instances is the hunting for diversity

and pluriversity of (im-)pure orifices and openings, whether human, animals or posthuman.

While Africans are urged to become posthuman, to become animals, to dispense with their identities and heritages, Europeans are ironically busy protecting their human identities and heritages including human genetic heritages (Halev, 2002; The Guardian, 7 August 2001; Ardekani, 2009; Knoppers, 1991). In fact, in Eurocentric scholarship, African assertions of authentic identities are summarily deemed to be primitive; indigenous identities are supposed to disappear and make way for Euro-Americans that are assumed to be becoming indigenous on the African continent from where indigenous Africans are fast departing both literally, virtually and metaphorically (Barman, 2007; Sium *et al*, 2012; Haggan, 2012; Andrew, 2006; de Walt, 2013; Bell, 2014). Departure here entails physical migrations, deaths, genocides, loss of authentic African identities and loss of African cultural and ancestral moorings – it includes Western-inspired emergent processes of “becoming animals”, becoming other than humans or nonhumans or becoming a hybrid, cyborg or half humans. The challenges of genetic modifications are well captured by Knoppers (1991: 1-16) thus:

At the same time, the potential for this science lies in the knowledge it provides; knowledge that will finally force to the forefront a discussion of the nature, uniqueness and potential for change of the human species...There is no doubt that the new tools of human genetics do and will affect the human being in the ultimate substratum, namely the gene...In 1982, the Council of Europe, in its recommendation on Genetic Engineering, advocated that the right to life and to human dignity implied the right to an unaltered genetic pattern – one that had not been artificially altered. It also proposes that this right should be made explicit in the European Convention for the Protection of Human Rights and Fundamental Freedoms ...there is no doubt that respect for the human body, for one's genetic make- up and origins, is indivisible from respect for the person...The Council of Europe linked the right to protection of the genetic heritage to the right to life and to human dignity...heritage is seen as an estate, a right of endowment inherited from one's ancestors.

While scholars like Posselt (1935) decry the (neo-)colonial destruction of African institutions including the families, marriages, politics and religions, other scholars note that the destruction of marriages, families, and so on is connected to the objectives of the illuminati who seek to create a New World Order wherein marriages, families, morality, ethics and domestic bonds are destroyed (Knight, 2003; Bennett, 2003; Welch, 1985; Dice, 2016). The precolonial Shona people, in Zimbabwe, had their efficient legal systems wherein there was equality before the law, no arbitrary application of laws, existence of privy councils of headmen and wisemen to assist chiefs, wherein reparations were a salient feature, wherein homosexuality, incest, bestiality, cannibalism, witchcraft, sorcery, homicide, rape, prostitution, fornication and adultery were prohibited (Posselt, 1935; Holleman, 1969). The global elite that are understood to make up the illuminati and freemasonry are noted as keen to destroy marriages and families through the normalisation of homosexuality; promiscuity, humanoid sex robots, teledildonics, virtual sex, single parenthood, masturbation, nonprocreational sex, open marriages, abortion, drug use, self-worship and redefinition of marriage (Tucker, 2013; Dice, 2016; Payson, 2003; Birch, 2007; New American, 19 June 2015).

Thus, in spite of observations that it was only devils and witches that fornicate, performing all kinds of sexual acts from incest, homosexuality to sodomy and bestiality (Lima, 2015), Euro-America is anxious to normalise the unnatural bestiality, homosexuality, gay marriages and incest (Dice, 2016). Although such extreme sexual liberalism is portrayed in terms of human rights, the liberalism effectively translates to animalisation in the sense of eroding the difference between human beings and animals that have incestuous sex with their mothers and sisters and brothers. In fact, the liberalism effectively translates to transforming the human beings to something worse than animals that do not engage in homosexuality. The hypocrisy of the Promoters of homosexuality is captured by Zagami (2016: 129 - 130) thus:

In a society that already struggles with poverty and growing social problems, the elite and their illuminati slaves instead indulge in the

advocacy of a liberal agenda that openly promotes gay marriages, abortion rights, and Satanism. This effort is supported by an increasingly sick elite that is full of hypocrites, and who secretly intend to eliminate a large part of the world's population, as they stated on the Georgia Guidestones, including the commercialization of human body parts, as exposed in the Planned Parenthood Controversy in 2015...In England, homosexuals reside at the top of the hierarchy that rules the United Grand Lodge of England, and their more popular rite called Emulation, which only opens to dark energies and chaos. In their Masonic Lodges and Illuminati sects like the Ordo Templi Orientis, many openly promote homosexuality and bisexuality as added values in line with their "prophet" Aleister Crowley, and his depraved cult of Thelema, where their motto is: "Do what thou wilt'..."

Marked by Eurocentric postulations on becomings which include becoming homosexual; becoming animals; becoming immoral; becoming animistic; becoming posthuman; becoming unethical; becoming unGodly; becoming AntiChrist and becoming hybrids, the world is being prepared for transformation much of which is not necessarily decolonial in Pan-Africanist senses of securing restoration, restitution and reparations for (neo-)colonial dispossession and exploitation. Contrary to the Pan-African decolonial perspective, some Eurocentrists understand liberation in terms of deconstructing and decomposing the authority of God by bringing in the figure of the AntiChrist (see Zagami, 2016; Dice, 2016). Consonant with the Nietzschean Death of God thesis in New Age spiritualism, technopaganism, technomysticism, the worship of nature, Mother Earth (Robertson, 2009; Petersen, 2009; BBC News, 1 August 2015; Business Insider, 27 October 2016; Hjelm *et al*, 2009; Fritzsche, 2013), the figure of the AntiChrist appears to be emergent in the emergent theories of animism and posthumanism. Such a figure of the animistic AntiChrist is presented below.



Symbol of Satan's Statue (Source BBC News, 1 August 2015)

Is Animistic Jurisprudence Indigenous or Is It Merely a Fad to Control Africans?

Designed to address Cartesian dualisms rather than to restitute, restore and compensate (neo-)colonial African victims of dispossession, exploitation and genocide, some contemporary Eurocentric theories postulate animism – which postulations have got big implications on questions of law, ethics and morality. Addressing Cartesian dualisms, the animistic theorists postulate absence of distinctions between African human beings and animals, the human and the nonhuman entities; there are also postulations about the agency, vitality, performativity, vibrancy of things (Nhemachena, 2016; Nhemachena *et al*, 2018). Unfortunately, the agency, vitality, performativity and vibrancy that are postulated in the theories do not speak to restitution, restoration and reparations to (neo-)colonial victims of dispossession and exploitation. Observing that (neo-)colonialists have not necessarily separated themselves, or dissociated themselves or disconnected themselves from Africa and

from African resources and properties, we argue that Africa has not [in this regard] been afflicted with Cartesian dualism, separation, dichotomies or disconnection. In this regard, theoretical postulations that foreground and problematise Cartesian disconnections, separations, dichotomies, dualisms or binaries miss the real problems that Africans are experiencing on the continent. The problem for Africa is not simplistically about Cartesian separations and disconnections, rather the problem is also about absence of separations and disconnections and dissociations. In fact, the major problems are theft, looting, robbery and plunder of Africans' resources. If (neo-)empire were sincere about the relevance of Eurocentric postulations on agency, vitality, performativity and vibrancy, then it would be expected that there be agency and performativity in terms of restitution, restoration and reparations.

Whereas some scholars postulate that statues and other things like plants, animals, stones, minerals and artefacts have agency, vitality, sensuality, embodiment of agency, subjectivity, relationality, affect, potency, indwelling spirits and so on (Blakey, 2006; Garuba, 2003; Whitehead, 2011; Lindstrom, 2015; Alter, 2006; Deng *et al*, 2008; Kimmerle, 2006), we argue that resolving Cartesian dualism or dichotomies need not be the focus of Africans. Africa has completely different problems arising from (neo-)colonial dispossession, exploitation and genocide. To argue, as some scholars do, that even statues, stones, bones, artefacts, minerals and so on are not dead (Alter, 2006; Rooney, 2004) [and that there is no distinction between being dead and being alive] would provide an escape route for (neo-)empire which is being sued for genocide on Africans. Genocide is in fact defined in terms of the distinction between the dead and the living and so we argue that contemporary Eurocentric efforts to efface the distinctions between the dead and the living are meant to pre-empt African struggles for compensation for genocide. The point here is that the law requires a clear distinction between the dead and the living, the active and the inactive [as presumed in the *actus reus* principle] otherwise the crimes of murder, manslaughter, genocide, culpable homicide and so on would be impossible to prosecute. The Herero and Nama people of Namibia are for instance currently in a legal tangle with Germany which perpetrated genocide in Namibian

in 1904 (Warikandwa *et al*, 2017) – Germany is unwilling to pay the compensation for the genocide.

The import of the (neo-)colonial theories or paradigms of animism and fetishism which are being popularised in Eurocentric scholarship is to again portray Africans as indistinct from animals and nature. The idea is to consider Africans to be less than human and therefore as not deserving human rights including the right to compensation for (neo-)colonial crimes including dispossession, exploitation and genocide. If there are no distinctions between African human beings and animals or nature, then how will Africans claim their human rights to be compensated for genocide? If there is no distinction between the dead and the living, then how will Africans claim compensation for genocide? If African spirits dwell in nature, and in artefacts as contended by Eurocentric scholars writing about fetishism (Rooney, 2004), then how can Africans claim compensation, restitution and restoration of their homesteads that are being destroyed in violence including by the ongoing transnational corporations' land grabs in Africa? If there are no distinctions between nature and culture, how can Africans claim damages for destruction of their cultures and homesteads?

The (neo-)colonial import of paradigms of fetishism and animism is explicated by Taylor (2005: 80-1) thus:

In building his theory of animism, E.B. Tylor intentionally disguised the colonial conditions that provided his evidence. Ignoring the social, political, intercultural, and interreligious contexts in which his evidence was embedded was not an oversight. It was a method. According to Tylor, “savage religion” had to be abstracted from its living contexts in order to be used in an evolutionary history of human culture that began with primitive animism...According to this method, therefore animism appeared as the original religion – the earliest, the lowest – only by erasing the actual colonial situations in which indigenous people lived. As a result, the theory of animism provided an ideological supplement to the imperial project...As a point of entry into the study of religion and nature, the theory of animism presents a problem, bearing traces of nineteenth-century European imperialism,

colonialism, and capitalism, rather than a solution for our understanding of religious engagements with the natural world.

The fact that animism and fetishism are (neo-)imperial sleights of hand to deny Africans' human essence and human rights is also underscored by Lindstrom (2015: 207-225) who writes that:

In recent archaeological theory, the term 'agency', has been attributed to things, plants, animals and humans....To speak of 'human nature', or the 'nature' of 'essence' of anything, for that matter, has been banned from archaeological theoretical discourse for decades. 'Essentialist' has become an abusive term. This is odd, for two reasons: first, a conception of the species characteristic of humans, that there is a 'human nature' that is common to all humans is so widely accepted as to be the basis for the Universal Declaration of Human Rights (UDHR)...Equal rights rests on acknowledging a certain sameness regarding essential characteristics...to abolish the concept of something's 'nature' or 'essence' is odd considering that archaeological practice increasingly employs, in very sophisticated ways knowledge from scientific fields that do study the nature of things.

Conclusion

It has been argued that contemporary paradigms or postulations about posthumanism, animism, fetishism and transhumanism propel forward the (neo-)imperial project that loathes the bodies and authentic identities of the African others. They replicate (neo-)imperial denials of restitution, restoration and compensation to the African (neo-)colonial victims of dispossession, looting, robbery, theft, exploitation and genocide. Deemed to be other-than-humans, to be indistinct from nonhumans, from animals, and deemed to be becoming transhumans and posthumans, Africans will not be able to claim their human rights to restitution, restoration, reparations for various (neo-)colonial crimes. In fact, whereas these contemporary Eurocentric theories deny the existence of clear identities, the law requires clear identities of the parties appearing before the courts – if Africans become indistinct from animals, or from nonhumans, the

question is how then are they going to claim human rights in the courts that require clear identities of the litigants? It has also been argued that whereas African Ubuntu-informed humanism entail ethics, morality, etiquette, restoration, restitution, reparations, justice and observance of laws, Eurocentric human rights jurisprudence pays scant attention to ethics, morality, etiquette, justice, rationality, logic, objectivity, truth, reparations, restitution and reparations. If the Eurocentric human rights jurisprudence had morality, ethics, objectivity, rationality, justice, etiquette at its centre, it would have ensured that (neo-)colonial victims of dispossession, exploitation and genocide were restituted, restored and repaid. In fact, if it had justice, morality, ethics, objectivity, rationality, etiquette and logic, the Eurocentric human rights jurisprudence would have prevented the (neo-)colonisation of Africa in the first place. In this respect, we do not consider real human rights to originate from Euro-America – real human rights emanate from Ubuntu-informed jurisprudence which explains why Africans did not colonise the world: the fact that Euro-America (neo-)colonised the world casts long shadows on the supposed justness, rationality, objectivity, logic and morality of their jurisprudence which is sadly paradoxically considered by some thinkers to be the right models for global justice and legality. The question that ran through the chapter is, if Eurocentric jurisprudence failed to prevent the colonisation of the world by Euro-America then how can such jurisprudence prevent the neo-colonial injustices, illegalities and inequities including the ongoing 21st century dispossession of African peasants by transnational corporations? This is a question that we would expect African researchers, scholars and thinkers to address in future treatises.

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Colonialism, the Theft of History and the Quest for Justice for Africa

Everisto Benyera

Introduction

This is a general and explorative chapter which characterises the colonial relations between the west and its colonies as a parasitic relationship that is based on various modalities of theft. I use the terms 'Euro-North America', 'colonisers' and 'west' interchangeably to generally depict the colonising nations, severally and jointly: the term 'colonies' to refer to those continents, countries and communities that are at the receiving end of (neo-)colonialism and coloniality. This is however not to deny or undermine the differences in both the colonising nations, Euro-North America, western countries and the colonised nations. Conceptually, the chapter views the subjugation of Africa as having started with Euro-modernity, hemispherisation, slavery, colonialism and the current phase of coloniality. For this reason, I present the modalities of theft from Africa not only as historical facts but also as an ongoing reality. The resilience of colonialism, including the power relations that remain tilted in favour of the colonising nations and against the colonies, is termed coloniality. Decoloniality is the endeavour to unmask and jettison the various manifestations of forms of power relations wherein the colonial relations barely changed in the aftermath of the various decolonisation processes. Therefore, colonisation outlived decolonisation and the product is coloniality. The specific decoloniality aspect that is being explored here is the theft of African history by the west.

The theft of African history was committed by the colonisers not only through the physical abduction of Africans but also through deliberately misleading them about who they are and what they own. The extent of the damage that colonialism did to Africa and other

parts of the formerly colonised world is therefore under-comprehended and yet to be fully conceptualised. African history is largely history from the colonialists' perspective, told by the colonialists or through their surrogates. Reproduced over time, African history became an apologetic narrative of the evils of colonialism, presenting sanitised versions of historical encounters between the colonisers and Africans. This constitutes injustice of the highest order and its correction constitutes restorative justice for Africans. By deploying Jack Goody's thesis on the theft of history (Goody, 2009), I argue that colonialism stole Africa's history and obliterated its civilisations, in the process stealing Africa's institutions and practices. These institutions and practises were exported from the periphery and imported into the metropolis, to use terminology popularised by dependency theorists such as, Raul Prebisch, Samir Amin, Immanuel Wallenstein, Andre Gunder Frank (Amin, 1976; Frank, 1978, 1966; Prebisch, 1962; Wallerstein, 2011).

The chapter outlines the logic of colonialism, examines what colonialism stole from Africa and how such theft was executed and sustained. It also questions what form of justice applies to a people who were colonised and whose history was stolen. I depart from the analysis of colonialism as mainly economic theft by exploring how two of Africa's foremost institutions - the university and democracy were stolen from Africa by the colonialists who exported them to the metropolis, adulterated and re-exported to Africa as tools of the colonial practices. I end by making some propositions on how Africa can recover its stolen history.

That Africa was described by western philosophers such as Hegel as lacking history is in a sense true (Hegel, 1956), however, not in the typical Hegelian conceptualisation of both philosophy and politics which excluded Africa from his realms of civilisation that only included the Oriental, Greek, Roman and German. The question that is not being asked is what happened to Africa's history if it did not exist then. Well, British anthropologist Jack Goody has the answer and it is that Africa's history was stolen. The thieves are known and it is the colonialists, European colonial thieves to be precise. Colonialism must therefore be understood as an ecosystem

of kleptocracy as opposed to analysing it as an individual act by misguided white supremacist.

The fact that African history is periodised based on pre-colonial, colonial and post-colonial epochs is evidence of the theft of many things that are African, especially Africa's time, geography, knowledges and other forms of wealth such as medicines, and extractive resources. In asserting that indeed Africans were the first philosophers, Asante (Graness, 2016: 133), demonstrated that it is a 'fact that the Egyptians were the first philosophers'. I make the claim in this chapter that Africa is an all-round extroverted continent because its history was stolen and without history, remembering the past, navigating the present and planning the future is predictably a challenge for Africa as evidenced by wars, famines and other forms of human deprivation and suffering that characterise Africa today.

The chapter prioritises the impact of the theft of Africa's institutions of time, the university and democracy. I argue that the theft of concepts of telling time and their subsequent replacement with western forms of time comprising the 12 months Julian calendar, 24-hour day and 60-minute hour disoriented Africa, erased its past and set Africa afoot a timeless path of subjugation, subordination and marginalisation. For Africa, it is not a case of borrowed time, but one of stolen time. I justify my choice for the theft of history as the analytical framework for this chapter.

Why the Theft of History as the Analytical Framework?

The theft of history reported on by Jack Goody occurred at two levels. Firstly, at the level where the colonialists misrepresented Africa and in the process reported on African history using European and American parameters. In my view, this amounts to what I can term the mishistoricisation of Africa. By using the wrong time concepts such as Karl Marx's historical materialism, African history was destined to be recorded wrongly. Hence, the common saying that the history of Africa today is a history of Europeans in Africa. To that, I add by Europeans to make it, a history of Europeans in Africa by Europeans.

At another level, the theft of African history occurred as a direct consequence of the theft of African institutions and concepts which the colonialists learnt from Africa. The colonialists never acknowledged the source of these institutions and these include democracy and the university. This point is argued very well elsewhere by Said (1978). In order for these thefts to succeed, the colonialist dealt the colonised peoples one fatal blow, that of stripping them of any semblance of human characteristics. Once the colonised peoples were stripped of any humanity, the colonisers had the passport to treat them as they wished on the basis that they were not mistreating their fellow humans but another sub class of humanity. As articulated by Maldonado-Torres (2007: 245) in his thesis on the *Imperial Manichean Misanthropic Scepticism*, racist colonial whites doubted the very humanity of the peoples they colonised. This has been characterised variously as dehumanisation, thingification, objectification, commodification and many other such superlatives which endeavour to depict the evilness of the imperial man (Benyera, 2018: 138; Cesaire, 1955: 21; Wynter, 2003; Ndlovu-Gatsheni, 2015: 490; 2013c: 12). This practice was expressed in the form of human zoos. This was a practice between 1860s and the 1930s where blacks were exhibited together with animals in zoos. In these zoos and circuses, blacks were variously described as ‘specimen’, ‘savage’ and ‘native’ (Blanchard, Snoep, and Boetsch, 2011; Jensen, 2007). This phenomenon has been developed and was termed coloniality of being with Maldonado-Torres as the major protagonist (Wynter, 2003; Maldonado-Torres, 2007; Ndlovu-Gatsheni, 2012, 2013a). For that reason, I will not argue this point any further.

This chapter will build on the foundations of Goody’s concept of the theft of history. To this, I will add deliberate direct theft of institutions and ways of life, while at the same time denying the colonised to continue practicing those same institutions. For example, in Colonial Zimbabwe the traditional institutions of governance, which existed prior to colonialism, were either decimated, adulterated and or criminalised. Additionally, traditional leaders with the people at heart such as Chief Rekayi Tangwena of Nyanga in Zimbabwe were removed by the colonial administrators and were replaced by native informers masquerading as traditional

authorities. These native informers were appointed by the colonial administration not to act on behalf of their subjects but rather to oppress their subjects on behalf of the colonial administration. This type of history amounts to a double-edged sword where the institutions of the traditional chieftaincy, which were supposed to protect the people, were deployed by the colonial administration as oppressors of the people. Hence, I argue in this chapter for the need to decolonise the institution of the African chieftaincies and return it to the people, and the same argument and call can be made for African leadership in generally. The desirability of this retuning the chieftaincy to serving the people and not the government is well captured in the African saying that one is only a chief if he is leading people. A Malawian proverb aptly makes this point and it goes, *'he who leads with no one following is merely taking a walk'*.

According to Goody, scholars have postulated that the concepts of democracy, capitalism, individualism, freedom and even romantic love were entirely western phenomena, and have taken credit for a plethora of inventions and ideas that actually were developed entirely, or at least in part, elsewhere. The reason for this misappropriation is that historians are using frameworks which do not allow for the proper or fair analysis of the development of non-western societies and civilisations such as the Mutapa empire which does not fit into the conventional Marxist developmental trajectory. There are other scholars who also made similar arguments to that of Goody such as Edward said, Edward Said's canonical text titled *Orientalism* (Said, 1978).

For Marx, the history of humankind is universally trajectorised as moving through the stages of antiquity or primitive communism, slavery, feudalism, capitalism, socialism and finally a classless, propertyless and stateless communism. This human developmental trajectory does not apply to non-western civilisations and studying such non-western civilisations using historical materialism results in what Goody rightly termed the theft of history.

The perennial problem with western liberal scholarship is the universalisation of the particular e.g. universalising particular western concepts such as what did Marx with his theory of history which he argued trajectorised from primitive communism, slavery, feudalism,

capitalism, socialism and finally communism. He ended up wrongly historicising and analysing non-westerners as deficient. The same argument can also be made about Marx's historical materialism in which he argued that at any given time the relationships between people were only for the purposes of fulfilling human basic needs such as food, clothes and shelter (Marx and Engels, 1848). Whilst these stages are relevant to the west, the eastern world has not developed in the same ways or through the same time frames. Equally inappropriate for historicising to non-westerners and non-American history is the assertion by Marx and Engels that, 'The history of all hitherto existing society is the history of class struggles' (Marx and Engels, 1848: 17). African societies were more or less united and when there were cases of any struggles, these were against other chiefdoms and armies that would occasionally raid their neighbours far and near for women, cattle and gold (Mudenge, 1988; Beach, 1998; Pikirayi, 2012; 1999). Even the west's celebrated notion of the industrial revolution having started in the north-west and Midlands of England in the 18th century (Wrigley, 1990; Crafts, 1977), and then spreading to Europe and North America in the 19th century, was proven to be wrong by Goody and others (Goody, 2009: 294). Goody specifically mentioned how large-scale state run companies produced ceramic tiles in China, textiles in Mesopotamia arguing that prior to the industrial revolution in Europe, there existed elsewhere:

...large-scale manufacturing enterprises, especially for textiles, and mostly run by the state. In Mesopotamia, woollen cloth was manufactured in what the archaeologist, Wooley, called 'factories'. His Soviet counterpart, Diakonoff, protested that they were only workshops, following Marx in reserving the term 'factory' for later capitalist (or proto-capitalist) production. In India, under the Mughals, kharkhanas were again state-organized institutions employing workers under one large roof to engage in the large-scale production of cotton cloth. China is an even more clear-cut case of an early form of industrialization (Goody, 2009: 294).

Goody therefore shows two things; that the west learnt most of the skills, concepts and practices they took credit for from elsewhere.

Secondly, that the very questions that were asked by liberal western researchers pre-emptively lead to flawed results, for example, Karl Marx's exclusive definition of labour which excluded non-western forms of labour.

One of the most profound contributions by Goody was to demystify western hegemony on history by *inter alia*, tearing into famed western thinkers such as Karl Marx, Max Weber, Fernand Braudel and Norbert Eliass among others. He argued that those concepts such as democracy (Goody, 2009: 285), capitalism (Goody, 2009: 180–214), freedom and even the concept of romantic love (Goody, 2009: 267–85) are not western inventions but were expropriated mainly from Africa and modified using ethnocentrism into their present day format. Also stolen from Africa were institutions, towns and universities (Goody, 2009: 215–39). This is difficult to refute given the manner in which Africa was perceived as lacking everything, from history, development, manners, rights and democracy. The epitome of this denialism is one Hugh Trevor – Roper who infamously noted that:

Perhaps, in the future, there will be some African history to teach. But at present there is none, or very little: there is only the history of the Europeans in Africa. The rest is largely darkness, like the history of pre-European, pre-Columbian America. And darkness is not a subject for history. Please do not misunderstand me. I do not deny that men existed even in dark countries and dark centuries, nor that they had political life and culture, interesting to sociologists and anthropologists; but history, I believe, is essentially a form of movement, and purposive movement too. It is not a mere phantasmagoria of changing shapes and costumes, of battles and conquests, dynasties and usurpations, social forms and social disintegration. If all history is equal, as some now believe, there is no reason why we should study one section of it rather than another; for certainly we cannot study it all. Then indeed we may neglect our own history and amuse ourselves with the unrewarding gyrations of barbarous tribes in picturesque but irrelevant corners of the globe: tribes whose chief function in history, in my opinion, is to show to the present an image of the past from which, by history, it has

escaped; or shall I seek to avoid the indignation of the medievalists by saying, from which it has changed? (Trevor-Roper, 1965: 9).

Other notable western liberals who propel the notion that colonialism was good for the colonies and that it is the colonisers who suffered and carried the burden of colonialism include Michael Ignatieff. Ignatieff argued the case for colonialism in *The New York Times Magazine* on January 5, 2003, urging the US to continue taking up ‘the burden’ to impose order on a fractious world. He wrote:

Those who want America to remain a republic rather than become an empire imagine rightly, but they have not factored in what tyranny or chaos can do to vital American interests. The case for empire is that it has become, in a place like Iraq, the last hope for democracy and stability alike (Ignatieff, 2003: 11).

There are many western liberal scholars who support colonialism or the recolonisation of Africa: others simply deny the various forms of theft from Africa despite the compelling evidence that exists today. For that reason, I will not prove the existence of denialists, colonialism pushers and apologists but will proceed to explore how colonialism created both the environment and mechanisms for the looting of Africa.

Mechanisms Used to Execute and Sustain the Theft of History

Once African history was stolen as demonstrated above, it was necessary for the colonialist and their agents to keep it as authentically theirs as possible. Several methods were used to retain the stolen goods, institutions and practices. Firstly, the colonisers deny Africa its sovereignty. Without sovereignty, African post-colonial states remain, to all intents and purposes, colonial states. Cases in point are the various West African Francophone countries whose condition for being granted independence by France was that France retains control of their currency, natural resources, foreign policies and the military. The question: Why did French colonies gain their independence in the same year of 1960 is well tackled by many

and will not be belaboured beyond this point (O'Brien, 1965; Ogunmola, 2009). Suffice to mention that the phenomenon where between January and December of 1960, 14 former French colonies gained independence typifies coloniality.

Secondly, the colonisers continue to use various forms of violence and the concomitant advantages of deploying violence. The deployment of military and economic force by the United States and its NATO allies in Libya is a case in point. NATO's invasion of Libya resulted in Libya being a failed state, with no functional central government and Libyans worse off after the 'liberation' than they were during Gadhafi's 'dictatorship'. What is evident here is that NATO's intervention in Libya via the UNSC Resolution 1973 of 2011 had nothing to do with liberating Libyans from Gadhafi's 'dictatorial' tendencies but everything to do with stealing Libya's natural resources, particularly its abundant petroleum (Campbell, 2013; Paris, 2014; De Waal, 2013). Any threat to western interests, human or otherwise is summarily eliminated.

Thirdly, the west still uses the old method of dividing their victims in order to conquer, rule and control them. Mamdani argues this point very well when he wrote about the good Muslim and the bad Muslim (Mamdani, 2002). That Africa is still referred to as Francophone, Anglophone and Lusophony Africa and not just as Africa attests to the resilience of the divide, conquer and rule *modus operandi* of colonialism.

The final method, I will discuss is when the west uses a three pronged method in dealing with African institutions, methods, practices and ways of life. Firstly, if they cannot agree to the practice, they simply demonise it. African ways of life and living such as ancestral veneration has long been termed demonic and archaic. Secondly, what they cannot stand, they will replace. This was the rationale behind the French system of an *evolué* and Portuguese system of *assimidado*, where Tsonga, Bitonga, Chitsva and other peoples colonised by the Portuguese had to change their names in order to conform to the desires of the colonies. Up to date, many former Portuguese colonised communities in Mozambique, Angola and other Islands still have two identities, a local one and a colonial one. Thus, one can be called João Pinto du Souza and also known as

Xitsudzuxo Shingange. Finally, that which they can live with they will sustain. What this dual naming implies is that such people live in a world of double epistemologies, a Xitsonga epistemology and a Portuguese epistemology. This system was used to deny Africans citizenship in their own countries. This was well argued by Taiwo:

I am arguing that citizenship, as it was articulated in European political theory and defended as one of the gains that the victory of bourgeoisdom secured for even property less proletarians in Europe, was not a presence in the colonies. In the colonies, there were citizens, made up of colonial settlers, officials, and their supporting cast, and natives, who could not become denizens of the mother country ... For the French and the Portuguese, the native could become a citizen of France or Portugal, but only after having become an *evolué* or an *assimilado*. In other words, even for the French and the Portuguese, the native could not immediately be a citizen (Táíwò, 2009: 43).

With foreign names and alien identities given to Africans, their geography and environment, the end result is the continued theft of history as Africans are still largely using wrong names for themselves and their places which include most countries, provinces and suburbs. Reading the map of Harare today sounds like reading the map of England as the names in Scotland for example are all found in Harare. The same is true across African geographies from Windhoek to KwaZulu Natal. Of course, there are various efforts by Africans to claim their bodies, humanity and spaces through but not limited to proper naming and renaming. However, the severity, elusiveness and persistence of coloniality has seen, for example, Musi ou Tunya in Zimbabwe and Zambia still being called The Victoria Falls after David Livingstone ‘discovered’ it and ‘named’ it the Victoria Falls after his Queen.

Ontological, Economic and Epistemological Thefts and the Loot Committee

As recent as September 2017, liberal western scholars such as Portland State University’s Professor of Political Science Bruce Gilley

were still arguing that colonialism was good for the colonies, especially for Africa (Gilley, 2017). The article titled; *The Case for Colonialism* appeared in the journal *Third World Quarterly* and was later withdrawn after a huge outcry from the 'third world'. Its withdrawal notwithstanding, the fact that a supposedly peer reviewed journal publishes an article which glorifies colonialism and goes to great lengths to defend it speaks volumes about colonialism and colonality and how the theft of African history continues today. The fact that the article was withdrawn not over claims of mishistoricising colonialism, shoddy scholarship or publication irregularities but rather personal threats to the journal's editor affirms the view that Third World Quarterly and many other like-minded western academics and academic outlets believe that colonialism was good for the colonised. This practise constitutes epistemic violence (Dotson, 2011; Fanon, 1952: xxv; Suarez-Krabbe, 2012: 36). It is part of the many forms of violence dispensed on the colonised as part of priming them for the colonial project.

Ramon Grosfoguel characterised these forms of violence as extractivisms for which he developed three categories. These are; 1) ontological extractivism, 2) economic extractivism and 3) epistemological extractivisms (Grosfoguel, 2015). I argue that these extractivisms were actually forms of theft, hence I contend here that Euro-North America committed the following forms of theft during colonialism - ontological thefts, economic thefts, and epistemological thefts. These forms of theft were institutionalised when the colonies were forcibly included into the following 1) the world capitalist system, 2) the Euro-North American-centric world culture and European languages, 3) the forcible partitioning of Africa at the Berlin conference and finally 4) Africa was dragged into a Euro-North American-centric moral order dominated by Christian thought (Ndlovu-Gatsheni, 2015: 486–486).

Colonial forms of theft were not applied randomly but systematically. Thus, the first form of crime that Africa suffered was ontological theft. This form of theft was expressed in various forms and it consisted of the following; thingification, creation of the damed/wretched and the act of doubting the very humanity of black people. Nelson Maldonado-Torres termed this practise *Imperial*

Manichean Misanthropic Scepticism (Maldonado-Torres, 2007). As alluded to earlier on, when your humanity is doubted, this opens the floodgates of abuse as you will not be deemed human, hence worth of being experimented on. This explains the logic of the ‘scientific study’ on syphilis that was forcibly conducted on black people. The Tuskegee University study was a series of clinical trials carried out between 1932 and 1972 by the United States Public Health Service where they studied the progression of untreated syphilis. For them what better experimental body than the black male body. These black men, mainly from Alabama went untreated for six to nine months while the Health Department studied and noted the natural progression of untreated syphilis.

Another example of the theft of Africans’ humanity was the well-documented Namibian Herero and Nama genocide between 1904 and 1907. After the Germans defeated the Herero at the battle of Waterberg in August 1904, the Herero fled into the desert towards Botswana. They were pursued by colonial German troops who caught up with the majority of the fleeing Hereros and out of a reported 80,000, only around 15,000 reached Botswana where they stayed until today. The 20 skulls kept at the Berlin medical Historical Museum consisted of 11 Nama and nine Herero skulls. These human remains were taken to German by German ‘scientists’ in order to conduct ‘scientific’ experiments to ascertain if indeed the Herero and the Nama were human. Up to this day Charite Hospital in Berlin has over 7000 human skulls collected from across Africa by the imperial German forces. There is no theft of humanity which can be equated to what the colonial Germans did to the Herero, Damara and Nama people of Namibia, a fact also conceded by the Germans. The question then is: what form of justice applies to such peoples whose humanity was so blatantly stolen? Let me buttress the point by pointing to the second case of institutionalised theft, from Africans by the colonisers, which occurred in South Africa.

One of the pre-colonial modes of wealth was livestock, especially cattle. Cattle played a pivotal role in Africa and the pre-colonial peoples had developed animal husbandry skills which resulted in cattle being the prime symbol of wealth and store and measure of value. In colonial Southern Africa, especially South Africa and

Zimbabwe, the colonialist stole livestock from locals at freewill. This act must not be viewed just as stock theft *njeeee* (mere stock theft). At the instigation of Jameson, the Loot Committee was established to manage the distribution of looted Ndebele and Shona cattle among the settlers with a loot package comprising the most fertile land, cattle and money. To the effect that they were unashamed of naming themselves as The Loot Committee, these thieves stole more than cattle; they stole a way of life, centuries old animal husbandry knowledges and a source of livelihood. This chapter alleges that the theft of livestock by the Loot Committee erased African modes of animal husbandry and qualifies as theft of knowledges. Knowledges on how to treat tropical cattle diseases were stolen, commercialised, patented and re-exported to Africa as foreign cattle medication.

There is a certain level of academic denialism which borders on epistemic deafness which tends to attribute great African acts of inventions such as the Great Zimbabwe and the Egyptian pyramids to aliens. This has been well argued by Innocent Pikirayi especially in his obituary to Peter Garlake who was a Zimbabwean archaeologist and art historian (Pikirayi, 2012). While there is no evidence for the existence of extra-terrestrials life. Western denialists would rather attribute the Great Zimbabwe to aliens, who do not exist, than attribute them to the Shona people and Africans who exist and who built them. The denial of the Shona people of their intellectual ownership, among others of the Great Zimbabwe, Khami Ruins, is theft of history. Other notable western denialists include Niall Ferguson (2012) whose book, *Empire: How Britain Made the Modern World*, argued that British colonial rule brought parliamentary democracy and English language to the colonies. Ferguson forgets that the colonies had their own languages, histories and ways of governance and that Britain did not bring democracy and a language, it imposed them on unwilling people. In the process, Britain and her allies stole African civilisations, just by imposing their system of governance and language.

By doubting that the Great Zimbabwe and similar architectural monuments in Africa were built by Africans, denialists succeeds in casting doubt on the authenticity of the monuments. This has the direct effect of rendering these monuments as contested sites whose

origin is unknown if not questionable. For Africans the travesty is that they cannot enjoy full ownership of a monument whose custodianship, origin and authenticity is questioned. Even the history of tool making is rooted in Africa where the first tools were manufactured. There is ample archaeological evidence to support this fact which includes the discovery of 3.3 million years old tools at Turkana in Kenya by a group of archaeologists (Harmand *et al.*, 2015).

The theft and plunder of Africa's history continues. As late as 2014, two German pseudo-scientists set out to "prove" that academics were concealing the Giza pyramids' "real" origin. To do so, they chiselled off a piece of one of the pyramids – of course, without authorisation, so they could "analyse" it. This complements the previous acts of 'research' by German universities who were involved in what Nelson Maldonado-Torres termed *Imperial Manichean Misanthropic Scepticism* (Maldonado-Torres, 2007: 235). This 'research' involved the stealing of Herero genocide victims' skulls from Namibia to German universities in order to ascertain, inter alia, if whites and blacks were biologically the same species.

Procrastination is not the Thief of Time: Of Stolen African Times

Let me begin this section by proffering a definition of time, one which I will use to frame my argument here. Time is the concept of duration, which measures periods separating them. This definition is important as it qualifies precolonial methods of telling time as authentic and demystifies that time was kept at the Royal Observatory in Greenwich, London. Rather, each civilisation, as it progressed, developed methods of telling and keeping time, which resonated with their lived experiences and environments. Time telling was central to pre-colonial civilisations as time telling was a matter of basic survival. Important events such as planting and harvesting, disasters such as flooding of rivers, the appearance of locusts, erupting of active volcanoes and the performance of certain rites, rituals and ceremonies all made it imperative to have intricate and accurate, consistent knowledge of seasonal changes upon which time was based.

In came Euro-modernity and then colonialism bringing in Euro-modern notions of the clock-based time. Realising that the best method of disorientating a victim is to deprive them of their sense of time, it did not take long before the colonial administrators and the missionaries began imposing their sense of time on their victims. For the missionaries, the week began on Sunday when all were expected to go to church and receive Holy Communion. For the colonial administrator, the year had 12 months, each with between 28 and 31 days, each month consisting of roughly four weeks and each week having seven days and each day having 24 hours and each hour having 60 minutes and each minutes 60 seconds.

Pre-colonial African time was lunisolar comprising years calculated from the solar systems and months calculated from the month. Hence, the Shona word for a month is *mwedzi*, which when translated to English means the moon. The course of the sun determined the year while the sighting of the new moon signified the beginning of a new month. All these knowledges have been replaced with western time telling instruments such as the watch, which is part of the colonial project.

Stated differently, Africa's notion of time and periodisation has been usurped by Western systems, which are now being preferred and used by the majority of the world, except some Islamic civilisations, which employ a mixture of the Julian calendar and the lunar moons. Colonialism was not only the physical occupation of Africa by the imperial thieves; it was also an erasure of the colonised people's history, which was made possible by replacing their concept of time. Since then Africa has been literally living on borrowed time, literally. Goody rightly noted:

Time in oral cultures was reckoned according to natural occurrences, the diurnal progression of the sun through day and night, its position in the heavens, the phases of the moon, the passage of the seasons. What was absent was any numeral reckoning of the passing of the years, which would have required the notion of a fixed starting point, of an era. That came only with the use of writing. The very calculation of time in the past, and in the present too, has been appropriated by the west. (Goody, 2009: 14).

While Goody was generally correct in the above assertion, he faulted in alleging that Africa only had concepts of telling and keeping time but lacked the writing skills. It is a fact that Africa had both writing and time, and that both were stole. I will illustrate in the next section how the theft of time is equal to mass chronocide. By this I mean the act of disorienting a civilisation with the aim of enslaving, colonising and dominating them. The same tactic is used in the United States as a way of interrogation where suspects are deprived of their sense of time in a bid to disorient them.

The Elephants and their Drinking Water Sources

There is a story that is repeated across Africa and it is about how a herd of elephants used to look for their drinking water. The mother elephant is the one that knows the whereabouts of water sources across the various African seasons. With the coming of ‘civilisation’ and the development of nature reserves and game parks, these habitats were cordoned off. Additionally, due to his benevolence, ‘mankind’ started drilling boreholes for the ‘poor elephants’ so that they would not journey for hours looking for water. The boreholes worked well and the elephant started living within small radii. The death of the mother elephant meant the disappearance of the knowledge about the natural sources of water, which the herd of elephants had relied on for ages. Subsequent deaths of other older matriarch elephant implied that eventually there was no elephant with a clue, not only about the whereabouts of the natural sources of water but also about the history of this practice. Disaster struck when the borehole broke down and there was no water for the elephants. Sadly, there was no elephant with the memory of their watering habits and of the location of the water sources.

Rat Receiving Cats’ Education

One of the greatest travesties committed by colonialist was to steal Africa’s education systems and replacing them with Euro-North American western centric education. The education system Africa uses today is a colonial imposition, which was and still serves western

capitalism at the direct expense of Africa and Africans. This explains the ever-ballooning number of university graduates who fail to solve Africa's many and ever increasing problems. The education systems in Africa today are not aligned to the needs and aspirations of Africans. I will explain this mismatch by borrowing an analogy from Nigerian scholar Ibekwe Chinweizu (2007). For Chinweizu, Africans are like rats receiving the education of cats. In the process, the rats will think it they are cats, and grow the natural instincts of killing rats, i.e., their own species. Chinweizu argued:

So, everything depends on the education they received, what it moulded them into. If you are educated as a lawyer, your mental framework tends to get limited to what you can do in a law court, or within the existing legal and constitutional arrangements. And if your education is such that you think from the point of view of your conquerors, if it moulds you into a black European, that is mis-education, not education. If you take a rat and train it to see the world in the way the cat sees the world, you have not educated the rat, you have miseducated it for life in a world with rat killing cats. You have actually made it an easier prey for the cats, because the natural instincts of a rat would have told it how to deal with cats, or how to avoid cats. But after you have given the rat the education of a cat, it would lose those instincts. It might even think of itself as a cat! And that is what this colonialist education has done to Africans for the last two centuries. We have been fundamentally miseducated, and we cannot even see the world from our own point of view, let alone in our own interest (Chinweizu 2007: 1).

These two short analogies sharply illustrate the concept of the theft of history whose result is coloniality. Throughout this chapter, I will be returning to these two stories and deploying them to demonstrate how most of the institutions, values, concepts and practises that are today labelled as of western origin are in actual fact of African origin, stolen from Africa, rebranded in the west and exported globally. Just like rats that received the education of cats from cats, the struggle for Africans who received western education is to reclaim their epistemology and ontological density and begin to

think and act in their interest, i.e. that of Africa. First, let me dwell on the contribution made by Goody in exposing and articulating western thievery.

On the Theft of Democracy from Africa

As part of the exploration of the broader theme of the theft of African history by the colonialists, I will explore in this subsection the theft of the institution of democracy from Africa. I allege that democracy is an African institution whose triple contemporary conundrum is universalisation, instrumentalisation and misrepresentations. All of these being projected from the custodianship of the west. The first task for this subsection is to offer a working definition of democracy then move on to prove that democracy originated from Africa and not from ancient Greece as is ordinarily believed.

The concept of democracy is not defined anywhere in the United Nations documents such as conventions and treaties. However, the wording of the United Nations Charter gives a glimpse of what democracy is. We find this in the preamble where the words ‘we the people’ give away the premise of democracy as that which is rooted in the will of the people, i.e., the supremacy of the governed. Secondly, Article 21 of the 1948 Universal Declaration of Human Rights affirms the supremacy of the people in the words, ‘the will of the people shall be the basis of the authority of government’. Most of today’s democratic practices and principles are contained in the 1966 International Covenant on Civil and Political Rights and these include, ‘the freedom of expression (Article 19); the right of peaceful assembly (Article 21); the right to freedom of association with others (Article 22); the right and opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25); the right to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors (Article 25)’ (United Nations, 2008). To synthesise the above, democracy is a form and systems of government where those who are ruled have a great and direct say in how they are governed

and this is realised through periodic free and fair elections with those being ruled enjoying a variety of freedoms such as freedoms of association, expression, peaceful assembly, to be elected into public office and to elect public such office bearers. Having framed a working definition of democracy, I will proceed to state my argument.

My argument is premised on the allegation that ancient Greece stole democracy from Carthage, which is in modern day Tunisia. When democracy arrived in Greece, it was adulterated and it became sexist and xenophobic as in the models of the so-called Greek democracies only free males could. Voting excluded slaves, women and those termed strangers. The same trend of qualified franchise was also to be witnessed in 1832 Britain, France and the United States where voting was a preserve for 'white gentlemen land owners and college graduates only'. While this was the order of electoral politics in Euro-North America, the opposite was happening in Africa, which is the crucible of democracy. I will later argue that democracy originated from Carthage, which is present day Tunisia, stolen by the Greeks, further stolen by the Europeans and Americans from where it was re-exported into the colonies as part of the greater colonial project. By the greater colonial project, I mean the whole gamut of the processes of modernity, hemispherisation, slavery, colonialism, globalisation and decoloniality. It is the sum of the perpetual subjugations experienced by the global south in the hands of the global north.

Generally, what is termed history today is not history but rather a product of a Eurocentric worldview, which was universalised through modernity. Equally, what is termed African history is not African history but an adulterated and polluted narrative. Epistemic deafness characterised the formulation of this version of history, which deliberately excluded Asia, Africa and the Middle East. Many histories, developments and inventions being attributed to Europeans originated from Africa. These institutions and practises were stolen from Africa and replicated by the west in the west and then propagated and historicised as western inventions.

There are many examples of cases where history was stolen from other civilisations and appropriated by the west as their own. I will

discuss two cases here. Firstly, the orthodox truth is that democracy was conceived, born and bred in Athens. That we owe this great institute called democracy to the Greeks is now an unquestionable part of life. Yet the truth is that democracy first existed in Africa in a place called Carthage, which is in Tunis, Tunisia. In Carthage, the rulers were directly elected by the citizens and ruled with no military power for up to two years. The military was separate from the political wherein generals were elected separately. The Carthagian form of democracy was well developed and it actually inspired the Greeks who proceeded to copy the Carthagians as many of their influential philosophers such as Aristotle continued to heap praise on this unique form of government. Aristotle wrote in the *Politica* that:

The Carthagians are also considered to have an excellent form of government... Many of the Carthagian institutions are excellent. The superiority of their constitution is proved by the fact that the common people remain loyal to the constitution, the Carthagians have never had any rebellion worth of speaking of, and never been under the rule of a tyrant (Aristotle, 1932:xi, 11).

Let me explain a bit here why I agree with both Goody and Aristotle that democracy originated in Africa in the then Carthage which is now part of Tunisia. Carthage had a structure, which was known as the Council of 104, which was council of judges but could be equated to today's senate as they also made the law. The royal family had executive powers, which was supposed to be checked by the Council of 104. Carthagians voted annually for their magistrates who were also known as *sufes* (Goody, 2009: 53). According to Aristotle, the Council of 104 had more power than the royal family, which was headed by the king. Aristotle described the Council of 104 as the highest constitutional authority in Carthage (Aristotle, 1932). This pointed to the existence of democratic tendencies of having bodies that check the excesses of the king and the royal family.

Carthage had well set structures of governance, which had specific tasks. Organisationally, the king was the head of Carthage, below him was the Council of 28, reported elsewhere as consisting of 30 members, the *Suffetes*. The *Suffetes* declared war, made peace, run

the tax administration and most importantly, in their functions, if the *Suffetes* reached a deadlock, the matter was referred to the citizens to vote on. Hence, Carthagian democracy was very direct as citizens voted on how the state was run. These are the origins of modern day referendums.

The Carthaginian government had many institutions, which included the Council of 104, the 30 Nobles, the ruling family clans and numerous other councils. Additionally, Carthage had well established voting structures which ensured that voting for the Council of 104 occurred annually. Essentially, Carthage was a constitutional democracy as described by Reginald Bosworth Smith in the following words:

The constitution of Carthage was not the work of a single legislator, as that of Sparta is said to have been, nor of a series of legislators, like that of Athens; it was rather, like that of England, the growth of circumstances and centuries (Smith, 1913: 21).

Other forms and practices that formed early forms of democracy were also found in the ancient Dahomey kingdom in today's Benin in West Africa. As contended by Goody, '... the preliterate kingdom of Dahomey took a vote by means of dropping stones in a container' (Goody, 2009: 288). Hence, democracy never originated from Greece's Athens but from Africa and it was stolen from Africa, rebranded in Euro-North America and re-exported back to Africa as an institution alien to the continent. Just like Edward Said traveling theory, when democracy was stolen from Africa, by the time it boomeranged, it was now something else. Euro-North American democracy being exported to Africa is commercialised, industrialised and devoid of humanism. Instead of democracy serving people, it is people who serve democracy. By this, I am referring to the bombing into democracy of Libyans, Syrians and Iraqis by the North Atlantic Organisation and their allies. A comparison of the 'undemocratic dictatorial' Libya under the late Colonel Muammar Gaddafi and the resultant 'democratic Libya' after the 'death of a dictator' bears testimony to the malicious intent of the west when they democratise by force. My argument is that democracy was stolen from Africa and

is now being instrumentalised to re-enslave, recolonise and destroy those resilient African practices that are counter-western liberal notions of commercialising, patenting and selling every aspect of human life. Prior to the Jasmine revolution, Libya had one of the most advanced welfare systems in the world - an epitome of Ubuntu.

In 1967 when Gaddafi came into power via a coup, Libya was one of the poorest African countries. By the time of his assassination, Libya was one of the richest countries in the world with the highest GDP per capita in Africa and there were more poor people in the Netherlands than in Libya basing on the poverty datum line. Today Libya is a failed state; hence, my argument that among the many institutions stolen from Africa, democracy is one of them. As NATO 'imported democracy' into Libya, Libya fast degenerated from a country with free education and medical care, where newlyweds received US\$50 000 from the government, a Libya with no external debt and where petrol was among the cheapest in the world at USD\$0.14 per litre to a failed state. Other forms of 'dictatorship' practised by Gadhafi included real gender equality, homes as real human rights provided by the state, Libyans benefited financially from Libyan oil (Gwaambuka, 2016).

Africa's Stolen University

One of the oldest universities in the world was established in Timbuktu, present day Mali. Described as the city of Divine light, knowledge, trade, hospitality, Timbuktu was one of the earliest universities which taught many subjects from law, mathematics, philosophy, astronomy, religion, medicine and commerce (Medupe, 2015; Rasmussen, 2014). Where could the University at Timbuktu be right now had it not been stolen? Of course, I will not debate whether the University of Timbuktu was stolen or not because its fate in the hands of predominantly the French colonisers and radical Islamic fundamentalists is well documented (Hoffman, 1995; Mulder, 2017; Green Martínez, 2015). Equally uncontestably is the fact that the modern university originated in Africa and Asia as admitted by Aristotle when he wrote:

Schools can be traced at Alexandria, Antioch, Athens, Beirut, Constantinople, and Gaza; they were in effect the universities of the ancient world. They varied in character and importance: at Alexandria Aristotle was one of the main topics of study; the chief subject at Beirut was law...(Goody, 2009: 223).

The task of this subsection is to demonstrate how the western colonialists committed what is termed here epistemological theft by stealing African knowledges and knowledge systems. Some of these knowledges and knowledge systems have since been patented to western individuals and organisations and no longer belong to Africa and Africans. Many medicinal plants, medicines, herbs and medical practices which are now labelled western are of Chinese, Indian, Oriental or African origin (Guthrie and Hartley, 1997). This constitutes theft of history as African history is recorded as that of people without medicine and health practices of their own while simultaneously, the history of Euro North America is recorded as that of peoples endowed with long histories of medical practice and healthy lifestyles (Trichopoulou and Lagiou, 1997).

In order for colonialist to achieve epistemological thefts, they had to first subdue the colonised. Here three forms of violence were used. These are subjective violence, symbolic violence and systemic violence (Zizek, 2008). Each form of violence fulfils a specific function; thus, subjective violence subdues the colonised. This form of violence can be referred to as foundational violence, and it functions to authorise the right of conquest and it had an 'instituting function' of creating Africans as its targets of colonialism and coloniality. This happened when Africa was partitioned at the Berlin conference. The irony, if not tragedy of the Berlin Conference is that while Europeans affirmed their sovereignties and vowed never to fight each other again, they proceeded to create 'legitimate' targets in the colonies. In order to effectively deploy violence, the rules that they had inaugurated for themselves were wholesomely suspended in the colonies. The conduct of imperial German during the Herero genocide exemplifies this practice (Ndlovu-Gatsheni, 2012; 2013a). This form of violence took the form of war, rape, murder, genocide and slavery.

Symbolic/legitimizing violence was used after conquest to construct the colonial order and routinise colonial reality. This form of violence normalised the abnormal, to borrow Masipula Sithole's thesis on how oppressive systems have a way of normalising their regimes (Sithole, 1993). Like the Stockholm syndrome, colonised peoples found some coping mechanisms with colonialism and coloniality, notably xenophobia and 'tribalism'. Legitimizing violence creates the colonised person as a legitimate recipient of violence, which includes being mishistoricised. It is this form of violence, which created the problematic African states and systems such as identity cards, passes and permits.

Systemic/maintenance violence was to maintain the logic of colonialism and was infused into colonial institutions and cultures. The western university in Africa is today an archetype of maintenance violence (Mbembe, 2000: 6–7). This type of violence was used to maintain colonialism as a system of governing the colonised. As a form of violence, it was given effect by colonial education, international law and globalisation. Chinweizwu's analogy of given above of the rats receiving the education of cats is useful in understanding how colonialism deployed miseducation both as a tool of governance and subduing the colonised. International laws especially those governing multilateral engagements such as the Rome Statute of the International Criminal Court (ICC), the World Trade Organisation's various protocols up to the many UN Security Council resolutions are all lopsided in that they protect the strong from the weak. During the drafting of the Rome Statute, western countries successfully opposed the inclusion of colonial era genocides and other crimes of enslavement they committed during their colonial conquest. This clearly attests to the fact that the ICC was not created to prosecute western leaders especially for their crimes in the 'colonies', but rather to police and manage the global south, particularly Africa, a continent where the court has thus far exclusively concentrated on. It is because of these and other related developments that this chapter calls for the rethinking of an African centred jurisprudence.

Yes, globalisation created a 'global village' but the full story is not being told. Like all villages, there are the rulers and the ruled, the late

arrivals and the natives and all the binaries that characterise the integration of the tired, weary horse and the whip holding rider. As the whip holding rider writes the history of horses or as the rat which received the education of cats writes the history of rats, surely that history will be mishistory.

As a result of the combined effect of the forms of violence discussed above, Africa experienced what I can term the multiplier effect of the theft of history. By this, I mean the compounded increase in the final damage to Africa and Africans arising from the various forms of violence as explored above. When African history was stolen, Africans started producing and reproducing, consciously and unconsciously, the colonial version of African history privileging it as if it is authentic, *bona fide* African history. An example given earlier is the way African historians analysed African history using Karl Marx's historical materialism and the trajectory of humankind from primitive communism through capitalism aiming for the stateless, propertyless communism. I noted earlier on about the miseducation of Africans by the colonial system which Chinweizu (2007: 1) rightly characterised as giving rats the education of cats. In this analogy, the Euro-North American colonisers are the cats and the colonised people are the rats. As such and because of the theft of history the version of African history which is the history of rats written by cats and educated rats analyses the problems of rats from the perspective of cats. This occurs through what is termed coloniality of knowledge wherein Euro-North American knowledge is privileged over all other knowledges.

With the wrong history, most of African solutions to African problems failed to work simply because of the misalignment between the history and the solution to the problem. Without properly historicising, the ensuing analysis and solutions, if any, will be all flawed. African history must be restudied in order *inter alia* to come up with the correct version of events upon which Africans can analyse their problems and proffer solutions going forward. At another level, Terence Ranger (2004) terms this phenomenon the development of patriotic history. As of now, much of African history is like that of the elephants who only remember the borehole and

nothing about the seasons and the rivers where they used to drink water.

The Western University in Africa

The various institutions of higher learning were rightly characterised as western universities in Africa and not as African universities. This is because when the university was stolen from Africa and the middle east, it was instrumentalised and reimported into Africa now as a colonial tool. In the process, the university underwent many turns, which will be explored later. The character of today's westernised university has deviated from what started in AD 859 in Fez, Morocco as the University of Karueein or al-Karaouine, founded in 859 AD in Fez, Morocco, for example. University of Karueein is the world's first degree awarding institution hence my claim that the university originated from Africa. Edward Said's travelling theory (Said, 1982) and extension of it to form the traveling university is a fitting analytical framework for this sub-section. Commenting on the origins of universities in Africa and the middle east, Jack Goody noted:

Schools can be traced at Alexandria, Antioch, Athens, Beirut, Constantinople, and Gaza; they were in effect the universities of the ancient world. They varied in character and importance: at Alexandria Aristotle was one of the main topics of study; the chief subject at Beirut was law... (Goody, 2009: 223).

Today's westernised university is a product of many turns. Borrowing from William Mpofu (personal communication: 2017), these turns can be chronologised as; (1) western turn, (2) colonial turn, (3) racial turn, tribal, sexist and patriarchal turn, (4) corporate turn, (5) nationalist turn, and finally the current (6) academic turn. These university turns, which set the African university on a roller coaster of changes, will be explained below.

The Western Turn

From its birthplace in Africa and the Middle East pre-colonial civilisations, the university was taken to Euro-North America in what is termed the Western turn. As part of 16th colonial conquest, genocides occurred alongside epistemicides (Grosfoguel, 2013). Knowledges and histories from Africa and the Middle East were usurped and appropriated or erased, silenced and distorted. This turn resulted in the western university removed from the colonised people, which reproduces and privileges epistemologies and ontologies of the Global North.

The Colonial Turn

That the Westernised University was complicit in the colonial project is a known historical fact. Universities were instrumentalised in the education and training that produced docile colonial subjects and usable natives. The colonial turn can be traced to Justice Cyril Asquith whose Asquith Commission issued a report in June 1945 to imperial Britain on how to establish university colleges in the British colonies. The Asquith Commission's terms of reference were to:

To consider the principles which should guide the promotion of Higher Education learning research and the development of universities in the colonies and to explore means whereby universities and other appropriate bodies in the United Kingdom may be able to cooperate with institutions of higher education in the colonies in order to give effect to these principles (Lulat, 2005: 227).

The commission's telling recommendation was the setting up of what became known as University colleges, e.g. the University of Ghana opened in October 1948, Ibadan in 1947, Khartoum and Makerere in 1949, Salisbury in 1953. At the centre of the triangular structure of coloniality (power, knowledge and being) is the university (Castro-Gómez, 2007: 79–80). It produces the likes of Hendrik Verwoerd, Hugh Trevor-Roper (Charterhouse and Christchurch, Oxford) and Charles Darwin (Cambridge and Edinburgh).

The Racial, Tribal, Sexist, Patriarchal Turn

The colonial turn had another trait imbedded in its Deoxyribonucleic Acid (DNA); racism, ‘tribal’, sexism and patriarchy. Student admissions were done according to racial quotas with blacks given disproportionally few places especially in the disciplines of medicine, law and other fields that were deemed to empower the natives. The universities, while being predominantly white, were also male dominated and women candidates were admitted in even small numbers, hence the notion of the fathers of the various disciplines. In South Africa, the ‘tribal’ aspect was very pronounced with the institutionalisation of homeland universities. Today’s universities such as University of Venda and Limpopo are products of the ‘tribal’ turn, a turn that still haunts these institutions today. For example, at the University of Venda, the Tsonga/Venda divide is still evident even among senior faculty members.

The Nationalist Turn

The nationalist turn was ushered in at the end of direct colonial rule. This is also termed the era of national universities, i.e. universities in the service of nationalism. Immediately after gaining independence, countries either created new universities or transformed existing ones into national universities. This turn was part of the independence euphoria, which also saw the creation of new symbols of sovereignty such as national anthems, currencies, banks, state symbols, etc. The product of this euphoria was well described by Frantz Fanon (1963) as the “pitfalls of national consciousness” and these became markers of the crisis of the university as we know it, i.e., not as centres of learning but centres for ‘tribalism’, xenophobia, nativism, autochthony and other chauvinisms which made the university their home.

A Corporate Turn

The university took a corporate turnaround the 1990s with the advent of the Washington Consensus. Here the university was transformed from being a public good of higher education and became a commodity in the market place. The university was corporatised and education commodified. Since its corporatisation

and commodification, the university became an intense site of the invisible but tyrannical market forces. In the place of it being an investment in the production of an informed and enlightened citizenry, public spending on higher education became expenditure and a loss. The poor and mainly black increasingly found the university inaccessible, those who managed to be admitted become university clients and not university students. Today the university is a corporate entity whose bottom line is profitability and not knowledge production. Hence, the paradox of a society whose problems remain unsolved while its graduates continue to multiply. Loans, fees per module and bursaries are top of the student's mind while the lecturer is concerned about the number of outputs, and management worries about massaging marks in order to improve the throughput rate in order to maintain the university's market share.

Another element of corporate turn was the unionisation of the university and the concomitant revamping of students' rights, which now include the right to free marks. As a result, the university is now a site of many fundamentalisms with knowledges which do not produce money being ostracised as ideologies, myths and unverifiable, if not outright falsehoods. The corporate university is therefore a site for the construction of elites, the filtration of knowledges and the commodification of education. One instrument for the filtration of knowledges is the structure called the Higher Degrees Committee

An Academic Turn

This turn is a product of the corporate turn and produced three categories of people at the university: (i) university workers, (ii) academic workers and (iii) intellectuals. The National Research Foundation rating system, which rates scholars in order to determine, *inter alia* fundability is part of the academic turn wherein knowledge is rated and allocated a market value. Now universities are ranked, knowledge is allocated impact factors and citations counted as a measure of scholarly weight. This breeds gatekeeping and autochthonous behaviours, what William Mpfu termed academic constables (personal communication). Because of its now corporate nature, the university was de-intellectualised and in turn

academicised. Hence, we have more academics and less of intellectuals (I am deliberately avoiding university workers). Academics are routinised, perform repetitive tasks religiously, are worried about missing deadlines, and are marketable. Intellectuals invent, create new knowledges, extend knowledges, challenge existing norms, scholarships and at times are rebellious. Resultantly, intellectuals have become scandalised and criminalised while academics are promoted and their views given gravitas. There are masters and doctoral supervisors who horde students and offer minimum supervision all in order to cash in on the supervision incentive. Academics are regularly in the market offering consultancy services and in the process abandoning the classroom.

A Decolonial Turn: Not Transformation

A decolonial turn entails the rehumanisation of the university. How do we rehumanise the university? I propose the following as the way forward; (i) epistemic restitution through de-education (ii) shifting the biography and geography of thinking (teaching and allowing our students to think (iii) inventing and deploying decolonial technologies (iv) investigating indigenous technologies such as harvest lightening and what is called witchcraft.

The Cartographical Misrepresentation of Africa as Theft

Let me also state something about Africa cartographical misrepresentation as a form of theft of history. The misrepresentation of the map of Africa as a small habitat contrary to its actual size is meant to portray Africa as a little continent. In fact, the actual size of Africa is such that Europe, the United States and India all fit into Africa. Africa's history as one of the world's biggest continents was therefore stolen by the colonial cartographers and endorsed by the liberal academic world as the truth. The real thief of geography, the one who initiated the programme of cartographically misrepresenting Africa by shrinking it, while simultaneously enlarging the likes of Canada by 300 of their actual size is a European cartographer, Geert de Kremer, better known as Mercator. De Kremer's 1569 'world map' projection is used today as the standard

world map: it is used in the classrooms the world over. This world map deliberately distorts the size of countries. The major beneficiary countries whose accual sizes were stretched are Canada, Russia, the United States and Europe. For the record, Africa is 30.2 million square kilometres while the United States of America is 9.1 million square kilometres while China is only 9.4 million square kilometres. Both the United States and china fit into Africa.

As the name suggests, *Nova et Aucta Orbis Terrae Descriptio ad Usum Navigantium Emendata*: (new and augmented description of Earth corrected for the use of sailors), de Kremer's map was intended for use by sailors. However, that the map was intended for nocturnal purposes is no excuse for the underrepresentation of Africa and the overrepresentation of the like of the United States, Russia, Canada and Europe. For Marianne Franklin, this is about 'power of representation and representation of power' and explains the rise of the Western nation-state system, the empire and colonialism'. The introduction of the lesser-known Peters projection from the 1970s (also called Gall-Peters projection) is a welcome decolonial move, which corrects this theft of land.

The official justification for the misrepresentation of Africa on the world map was that Euro North America needed more map space since they were developed and had more towns and places to be put on the map than Africa, which in most cases had just one or two places to put on the map. This borders on deliberate ignorance, i.e., to argue that what one does not know does not exist is inexcusable as it meant whatever existed in Africa when the map was drawn will be forever lost. Writing for CNN's Africa Review, Sophie Morlin-Yrona agued:

... But Canada, Russia, the United States and Europe are greatly enlarged. The distortion is largest near the poles: Greenland, which looks about the same size as the whole of Africa on the Mercator, is a classic example. In truth, it is no bigger than the Democratic Republic of Congo. That European and North American countries are enlarged is no accident. This system provided more space for Western cartographers to mark towns, cities, roads etc. in their part of the world, Kraak says. "If you would take a map projection with equal areas then

there is almost no space on the map to display all [these details].” There was, of course, much to map in Africa, too, but that mattered less to the cartographers up north (Morlin-Yron, 2017).

Franklin argued that the misrepresentation of Africa on the world which amounts to theft of both land and history. The logic is that if your land is not represented on the official documents, it does not therefore exist. Such unrepresented land cannot be claimed, as it does not ‘officially’ exist, more so, no sovereignty can be based on it. The best way of stealing land was therefore to exclude it on maps and appropriate it. This helped the west project a sense of self-importance by the Euro North America colonisers. Franklin argued:

The world maps that prevail today have been embedded in Western imaginations since the British Empire. They continue (to prevail) despite many challenges to their fairness and accuracy because they underpin the ongoing Anglo-Euro-American presumption that the world belongs to them, and pivots around these geo-cultural axes (Morlin-Yron 2017).

The cartographical misrepresentation of Africa enabled a number of colonial projects. (1) It made possible the denial of Africans of their sovereignty. (2) It actualised the self-importance of the colonisers as they became the authors and custodians of the world map. (3) This further played into their plan of projecting the world from Euro-North America, a system which still prevails today. (4) It sowed the seeds for many of the border wars between and within nations. (5) Cartographical misrepresentation rendered the decolonisation project a difficult and protracted. (6) By arbitrarily dividing some nations into different countries, it rendered some nations such as the Twa of central Africa stateless. Additionally, creating different countries from the same nation such as the Venda (Zimbabwe and South Africa), Tsonga (Zimbabwe, Mozambique and South Africa), the colonists divided and ruled these nations. The Venda or Tsonga history today is now not told holistically but is fragmented into Zimbabwean history told predominantly by the British and the same applies for Tsonga history which in part is told

by the Portuguese and part of Mozambique's history. The various African languages under the different colonial regimes began to change by aligning themselves to that of the colonisers. Thus, Mozambican Tsonga shows many Portuguese characteristics, while Zimbabwean Tsonga is influenced by English and South African Tsonga is influenced by African and English. The result is the loss of the Tsonga language in its original form. Of course, this is not to deny languages and cultures their right to evolve; however, such evolution must not be under duress.

Re-historicisation as Restorative Justice for Africa

African political leaders such as the late Libyan President Colonel Muammar Gadhafi have for long agitated for some form of collective justice for Africa for the many injustices meted on her mainly by Euro North America. Zimbabwe's former leader Robert Mugabe is also on record as demanding that those who benefited from the many thefts from Africa should pay some compensation. While the need for justice for Africa is undebatable, the challenge is what form of justice? For Mugabe the first step is for the Euro North Americans and their systems to respect African history as told by African historians. Launching the Pedagogical History of Africa Project in Harare in September 2011, Mugabe said:

The history that must be written by our African scholars and academics here is the history that focuses on African people in struggle as creators of their own destiny rather than mere consumers of stories written about them by passive on-lookers who oftentimes happen to be non-African outsiders. Real history belongs to a people in struggle and not to the interpreters of history. The people themselves are the makers of history and therefore the real historians. The interpreters are mere raconteurs of history and not the actual history-makers as is often wrongly implied. Only this way can we avoid history written by colonialists as 'winners'. Our real winners are the people, whose real history or struggle the so-called winners would like to distort and suppress. You cannot be a historian of African people if you do not share their cry or their laughter. No. The African sensibility, reflected

in African culture and worldview, is the only accurate compass to guide a historian who is genuine about writing African history. Slavery and colonisation do not themselves constitute African history. They disrupt and falsify the trajectory of African history. They dehumanise Africans to fit into the scheme of European capital. The ideology of racism is created as a parallel process to rationalise the oppression of Africans. I need not stress that it is imperative to edify educational systems, which embody the African and universal values so as to ensure the rooting of youth in African culture in the context of a sustainable and participatory development. This way we continue to foster the spirit of unity in Africa as embodied in the African Unity Charter (Mugabe, 2011).

African history was stolen through many ways. One of which was the teaching of African history with cold falsification. The result was what Anta Cheikh Diop called falsifications and intellectual sterility among Africans (Anta Diop, 1955: xiv–xv). One of these falsifications was denying that Egypt is part of Africa. This was done in order to deny the ‘Negro civilization’ its rightful claim to Egyptian architecture. An alternative category was created and it was called Egyptology (Depelchin, 2017: 142; Adegbindin, 2015: 22). This started in 1822 when Europeans managed to decipher ancient hieroglyphic script found in and the birth of Egyptology (Krueger, 1994: 50). In essence, Egyptology is a divide and rule method wherein the undeniable African civilisations such as Egypt and Kush are conceptually removed from Africa and rebranded, in this case as Egyptology. This was alluded earlier on and will not be attempted beyond this point. The epistemic project of rehistoricising Africa is under way in countries such as Rwanda where the teaching of history was suspended so that the history syllabus can be rewritten from a Hutu, Tutsi, Twa perspective and from a Belgian French perspective.

Towards the Decolonial Corner: The Ten Interventions and Africa’s Quest for Restorative Justice

So, where does Africa start this quest for rewriting reclaiming her history? I suggest ten interventions. Firstly, that the starting point in

this restorative justice project be a cartographical justice programme wherein the world map is redrawn correctly and proportionally. Such a map must clearly show the precolonial kingdoms. The matter of cartographical theft where the African map is shrunk while simultaneously enlarging the maps of Euro-North American countries was extensively discussed by many especially in Mark Manmonier's (2014) book *'How to lie with maps'* and there is no value in emphasising the matter in this chapter. So there is a need to start cartographical restorative projects where they can redraw the world map, not enlarging Africa in revenge or shrinking Euro-North America in relation, but redrawing the map to its actual proportions. This endeavour is also worth pursuing as a doctoral study.

The second proposition is to develop a set of African languages so that these languages can become scientific languages. Swahili, especially in the United Republics of Tanzania has reached that stage. Promote major African languages starting with regional languages one for west, north, east, central and southern Africa. As long as Africans continue to articulate their programmes, problems and solutions in foreign languages, as I am doing in these pages, the restorative project to restore Africa's humanity will be far from over. Language is not only a means of communication, more than that, it is repository of history, an articulation of the present and a crucible for moulding the future. As long as foreign languages are used, Africa history will be a mishistoricisation. There are languages that are widely spoken and used in Africa's major regions and these are a good starting point as Africa consolidates its languages away from English, French and Portuguese. These languages include Yoruba, Igbo, Fula and Swahili for the Niger-Congo languages. Berber languages can be used in North Africa; Amharic, Somali and Oromo Afro-asiatic languages include. For the Nilo-Saharan languages are Kanuri, Songhay and Nubian can be used. Rwanda demonstrated that it is possible to move from one national language to another when it switched from English to French, although it was a change within the colonisers languages, i.e. from French to English. The African Union must show decolonial leadership by dropping French, Arabic, English and Portuguese as its official languages and start using Africa's languages instead.

The demystification of decolonisation as a successful African project must be intensified. This takes the form of expanding the cannon, comprehension and application of decoloniality. That colonialism did not end but simply mutated into something else more lethal must be emphasised. Once the presence of coloniality is accepted as a reality, its dangers can be anticipated, seen and mitigated. However, as long as Africa and Africans falsely believe that colonialism and apartheid are over, the project to emancipate colonised people would have not even started. Colonialism must be unmasked as a matter of survival and urgency. More analytical frameworks must be added to the trilogy of power, knowledge and being. The work by Romain Francis on the coloniality of nature is heavily anticipated (PhD Thesis under research). Similarly, new work on the coloniality of the markets (Tafira and Ndlovu-Gatsheni, 2017), the coloniality of time (Demuro, 2015), coloniality of gender (Lugones, 2010) and coloniality of transitional justice (Benyera, 2015a; Madlingozi, 2010; 2007; Benyera, 2015b: 2017) among others must be further developed and deployed for analytical purposes.

One of the methods discussed in this chapter used by the west to retain Africa's history is by denying Africa its sovereignty. One way Africa can reclaim its sovereignty is by taking back the land with was stolen by the colonisers. Without the land ownership, there cannot be any sovereignty for sovereignty is exercised over land. After the land, issues of natural resources, the currency and foreign policies of Africa need to be revisited so that they serve and benefit Africa and Africans first so that inward looking. The issue of a common defence, foreign affairs and diplomacy, a common citizenship, an African currency, an African monetary zone, and an African central bank were proposed by Kwame Nkrumah in Addis Ababa in 1963. These issues still remain relevant and must be pursued and achieved.

A major challenge is whether Africa's situation can change, as the world remains capitalist. The world capitalist system is no longer part of the problem but it is now the problem and an alternative to capitalism must be thought and implemented. The failure of the global capitalist project was demonstrated by both liberal (Posner, 2009; 2010; Borón, 2010) and decolonial scholars (Mignolo, 2011;

Ndlovu-Gatsheni, 2013b; Mpofu, 2014) and is not worth belabouring.

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Revisiting Traditional African Land Ownership Practices Using Indigenous Knowledge Lenses: The Case of the Haya in Tanzania

Theobald Frank Theodory

Introduction

Land is a relevant resource for any agrarian economy whose members are reliant on crop production for their survival. This resource serves as an important factor in the cultivation of crops and as the main source of pasture for domestic animals and wildlife. The capability of households to produce largely depends on the availability and access to land as well as rights to land ownership. Thus, with well-defined African land ownership, it is assumed that individuals are able to exercise sustainable land use that will in turn, enhance conservation of land resources for better agricultural productivity. However, it may be argued that the magnitude of diverse environmental challenges such as soil erosion, severe land degradation and forest depletion can be augmented as the result of imperfect, inconsistent, or non-enforced African property rights. This implies that, complete, consistence and well-enforced land ownership is central towards sustainable land use (Sylvester, 2013). Despite the fact that, different reforms have been made with regard to African traditional land ownership, most indigenous societies in rural areas of Africa are still using land as traditionally owned. In most cases, traditional land ownership has been interfered with by the contemporary transnational corporations' land grabs in both rural and urban areas, which have become a major concern in African countries. This has triggered unceasing conflicts between indigenous communities, governments and "investors" who have leased chunks of indigenous land for different purposes mainly conservation, agricultural "investments" and mining activities to mention the few.

This chapter therefore examines the reinvigoration of traditional African land ownership for sustainable land use management at local level. The objective of this chapter is to provide an overview of African traditional land ownership and demonstrate how this approach may contribute in improving land management and sustainable development. Using the case of the Haya people inhabiting in the northwestern part of Tanzania, the chapter highlights pertinent historical issues of traditional land ownership in Tanzania and Africa at large. The chapter builds from literatures relating to land ownership and land tenure systems of different African countries. Data has also been collected from informed individuals, in some cases through personal communication. This chapter also draws from current personal observations of traditional land ownership and land management practices in Africa.

Contextual Issues: Pre-colonial African Indigenous Land Ownership

Different systems of land ownership have evolved globally. Throughout the past two centuries, most of the world's land belonged either to traditional societies, communally, individually or to the higher powers of monarch (Kasimbazi, 2017). In Africa, land in the pre-colonial era was perceived as God-given and could not be stolen from those bestowed with it. With colonial invasions, land was looted from Africans and the colonisers decided and disrupted extant African land ownership regimes. After robbing Africans of their land, the colonisers superimposed their own property regimes on the African ones. The superimposition of foreign common law brought a new vocabulary that made it problematic, if not impossible, to interpret African indigenous law on land ownership. In fact, the superimpositions also foreshadowed African land and broader property ownership regimes. Because African property ownership regimes were foreshadowed by foreign common law, it has been erroneously assumed that the [foreshadowed] African property ownership regimes never existed. The concept of “ownership” was particularly difficult, as it was the Eurocentric idea that before “ownership”, everything was held in common with everybody having

equal rights to the same thing, or that property belonged to nobody (Benette, 2004: 374). In Haya language, the vernacular term for ownership is *ebyange/ebyawe* vindicating ownerships for different assets within the community including land, cattle and other physical assets. This term for ownership underscores the existence of notions and practices of ownership among precolonial Haya communities and it has been foreshadowed by modern practices and notions.

In the precolonial times, indigenous peoples of Africa had plentiful land, with farming, mining, smelting, weaving and herding being the leading livelihood activities (Benette, 2004; Nhemachena and Dhakwa, 2017). Environmental factors such as rainfall, soil, topography and availability of water influenced the economy of the indigenous peoples in Africa. Thus, the land resource during the pre-colonial era held a substantial role in upholding social economic growth within the communities. In pre-colonial era, land ownership was both communal and individual, and was seen as a system of balancing interests held concurrently but the colonial regime changed it (Cousins, 2008: 111). This repeatedly entailed the colonial government trying to retain a form of ‘communal’ land tenure that might suit their interests. The African concept and practice of ownership were therefore foreshadowed in colonial times. The relationships among people in the pre-colonial era were more crucial than an individual’s ability to assert his or her interest in property. Rights to property were more in the form of obligations resulting from family affiliations than a means to exclude people from the use of certain property. Property has thus been argued to be entrenched in social affiliations rather than an individual’s exclusive claim over private property (Cousins, 2010: 60). While this may appear to be an aspect of African culture, I argue that even in colonial era, settlers constituted looting committees to rob and loot African resources including cattle and land. Colonial settlers did not necessarily operate as individuals but they banded together sometimes even mobilising some Africans to help them fight and rob their African kith and kin (Nhemachena, Warikandwa and Mtapuri, 2017). Thus, while some scholars argue that Africans on one hand had communal ownership while on the other hand colonialists are assumed to have had individual ownership, my argument here is that colonialists did not

necessarily have individual right – they did not act and think as individuals but they acted as bands of looters and robbers moving across the continent.

Pre-colonial Africans had indigenous laws governing the ownership and access to land. Like in any other jurisdiction, modern or traditional, the control and access to land should be viewed in the context of social relations, including the relevant African jurisprudence. This is due to the fact that traditional African leaders derived their legitimacy from the founding fathers and were viewed as a direct channel to communicate with the ancestors. They were vested with powers with regard to land ownership (Benette, 2004). On the other hand, descendants of colonisers “own” and control African land based on their “heritages” from their ancestors who stole the land from Africans – they also depend on their colonial ancestry but to claim [stolen] African land. In some societies, traditional leaders had power to allocate the land, to control the use of common resources in certain circumstances. Such decisions were also not made collectively, but they were made with reference to the common values of each level of leadership (Plessis, 2010). Traditionally, the power to control the resources required that the chiefs decide when and how these resources may be used. When the chief is formulating the rules concerning access, he was enjoined to exercise his discretion for the public good. The chiefly power was ruined by the colonial power that introduced the (white) magistrate and native commissioners in the 19th century (Benette, 2004). The imposition of (neo-)colonial rule and institutions resulted in the dispossession and subjugation of African peoples and the subordination of their indigenous institutions, customs and laws that regulated property ownership and control. Foregrounding their racist conceptions of law and society, the colonisers had gross disrespect for African indigenous legal systems, which had developed for ages - they supplanted them and replaced them with colonial legal systems (Bennett, *ibid*).

Lack of recognition of African indigenous laws in these colonial structures, undermined the African chiefly powers (Delius, 2008). For instance, in South Africa, the apartheid laws and structures broke down the chiefly power partly by appointing traditional leaders that

would promote the apartheid government's policies. Thus, indigenous systems of land ownership that were "managed" by the chiefs were replaced with colonial government regulations that only permitted quitrent (where annual rent was paid to the colonial state) and permission to occupy land was granted by the colonial state (Plessis, 2010: 4). In Ghana, the influx of the Europeans changed the face of the African traditional land ownership. The indirect rule approach used by the British colonies was instrumental in the change. The motive behind indirect rule was (neo-)colonial controlling of the people through their chiefs. As such, this system of administration debilitated the beneficence of the local chiefs to their people. For example, from 1878 to 1910, the colonial government in Ghana introduced a series of laws called "*Native Jurisdiction Ordinances*" (Selase *et al*, 2015: 92). Such laws aimed at granting limited power to indigenous rulers (chiefs) to preside over cases (Abayie, 1998). The result of this attempt was the replacement of indigenous systems of government with the colonial systems that castrated African chiefs of their power (Selase *et al*, 2015: 92).

In the 19th century, colonial rule superimposed Western regimes of land ownership, title, management, as well as the wider rights and responsibilities associated with land and natural resources. In this particular period, the colonialist imposed new sets of laws concerning land ownership that were left as a legacy and ultimately influenced postcolonial land policies of various countries. Although the land ownership was officially said to be based on "freehold" and "leasehold", it was in fact based on colonial robbery of the Africans. In most cases, different forms of customary land ownership were either ignored or overridden. For example during the eras of indirect rule, customary practices were reframed to meet the interests of colonial regimes. As such, the colonial machinations created new and artificial class and ethnic divisions for indigenous people. As a result, there was unequal and hierarchical systems of land ownership, in which colonial "freehold" and "leasehold" land rights were treated as superior to pre-existing African customary land rights. After political independence, most of the governments in African countries inherited this system, which has remained in place to date (Kasimbazi, 2017). In other words, the paradox is that Africans

inherited the colonial ownership systems that did not necessarily allow them to recover their land and other stolen resources. This can be observed in most countries, despite significant differences in geographic locations, historical development or the nature of land rights. This is somewhat a result of shared historical context, new international regulations, initiatives and influences concerning the Eurocentric basic human rights, which paradoxically marginalise African customary law including land ownership rights.

Secure Land Ownership for Sustainable Growth: Conceptual Reflections

Land ownership is central to sustainable natural resources management, and can be defined as the technique, whereby land is held or owned by individuals and groups, or the set of associations legally, including customarily defined (UN-HABITAT 2008). In other words, ownership governs relationships between [groups] people in respect of the property in the form of land, in this case. Land ownership can be a tool for conservation as it entails sets of rules and regulations employed to control and manage biodiversity, natural resources and the general environment. Primarily, land ownership defines how property rights (use, control, and transfer) are to be allocated within societies, and are commonly defined through statutory or customary law. Land ownership may also have both spatial and temporal dimensions, in that the rules can vary geographically and over time. Likewise, land ownership can be differently impacted by ethnicity, gender, class and political affiliation (Kasimbazi, 2017).

Secure land ownership is important for poverty alleviation and for improving economic development, social stability, gender equality and sustainable resource use. It is critical to note that when land is poorly managed, the associated challenges often lead to land degradation, loss of socio-economic development opportunities and ultimately conflicts. Secure land ownership can be sustained in different ways provided that the rights of land users and owners are clearly assigned. In addition to formal titles, security can be achieved through long leases or formal recognition of customary rights and

informal settlements. This range of likely forms of protection of interests in land has become internationally recognised as being a continuum, along which each form of ownership provides a different set of rights and different degrees of security and responsibility (Kasimbazi, 2017: 6).

Literature has revealed that improved land ownership is likely to improve the productivity of farmers through the intensification effect, which reflects the effects of land ownership on the motivations to invest, particularly in capital goods attached to land (see Feder *et al*, 1988; Alidri, 2016). This has been shown to operate by three mechanisms namely; firstly, if the farmers believe that they will be allowed to reap the long-term benefits of current investments, investment levels are expected to increase relative to a situation where there is land ownership. Secondly, land ownership can increase farming productivity through an improved allocative efficiency, which reduces the problem of lack of credit encountered by farmers who lack land. Thirdly, with inadequate credit, farmers allocate inputs under quantitative constraints (Besley, 1995). With secure land ownership, which might be used as collateral, these challenges are eliminated and farmers can borrow easily to increase their application of inputs to profit- maximising levels. However, it has been shown that inappropriate land use may lead into erosion and deteriorating land quality and ultimately leads to low rural productivity.

The current absence of clearly defined property rights inevitably triggers degradation of soils and other natural resources. The overall construal of such hypotheses dwells on the sense of collectively owned property and it may in turn, contribute to forest destruction, land degradation, and water pollution, hence restoring African property to indigenous people is crucial to sustaining natural resources (Coase, 1960). To address these challenges it has been suggested by DFID that the governments need to execute land reforms, using both “redistributive” reforms, and “land ownership” reforms to make sure that the population (both men and women) enjoy the same rights on land, to enhance the value of the land, to uphold investment, to lessen abject poverty and to contribute to sustainable land use and management (DFID, 2004).

However, literature has shown that secure African land ownership may promote more investments on land. Many studies about land ownership and investment have been conducted in countries like Ethiopia, Ghana, Kenya and Columbia. The findings from these studies appear to be consistent with the fact that indigenous people's security of land ownership influences the decisions on land investment (cf. Alemu, 2000; Dercon and Ayalew, 2005; and Awudu *et al.*, 2010). Awudu *et al.*, (2010) revealed that differences in land ownership significantly affect farmers' decisions to invest in land by improving and conserving the soil. Similarly, Alemu, (2000) observed that secure land ownership influences the decision of the farmer to invest in soil conservation while non-secured ownership does not promote soil conservation. This finding concurs with Fraser (2002) who emphasised that farmers who do not own land encounter a high discount rate and plant more crops that provide only short-term return. While farmers who own their own land promote long-term management and plant crops that improve soil conservation.

Historical Context of Land Ownership in Tanzania

In Tanzania, the development of land ownership has evolved through different historical phases, which subsume pre-colonial era, colonial era and independence. In the pre-colonial system sometimes known as customary tenure regime, land was owned customarily. Under this land ownership regime, land was predominantly communally owned by genealogies, clans and families (Mugabi, 2013). All issues related to land administration and conflict management were resolved by the elders who were also custodians of the customs (Sylvester, 2013). Title to the land for different genealogies in Tanzania was based on traditions and customs of respective genealogies. Chiefs, headmen and elders had the controls of land administration in trust for the community. These institutions of chiefs and headmen have been resilient throughout the colonial era - though they were interfered with by the colonial land tenure system under which all the land was declared colonial crown and public lands (HAKIARDHI, 2011). Despite being interfered with by

colonial rule, customary land tenure is still in place, but since 1963 the traditional chiefs, elders and headmen have been replaced by elected village councils.

During the colonial era, different tenure systems were introduced first by the Germans and later by the British (Mugabi, 2013). Land was a target of colonial powers for production of the required raw materials like crops, forest products, minerals, and wildlife. During German rule, land was declared to be owned by German King Kaizer as per 1895 imperial decree. The British passed a Land Ordinance Number 3 of 1923 establishing a title deed system with prominence over customary tenure. During the independence period, there were no changes to the 1923 ordinance. The only noticeable alteration made, was the replacement of the word Governor with President. This marked the beginning of land as public good and was vested on the President of Tanzania on behalf of all the citizens. Act No. 47 of 1967 was ratified to provide for procedures that underpin the Presidential powers on land acquisition (HAKIARDHI, 2011).

In the 1990s, the Tanzanian government realised the need to formulate and implement clear and coherent land policy that would enhance proper management and allocation of land resources in both urban and rural areas. The government therefore, established the National Land Policy of 1995, which categorically provided that the President of the United Republic of Tanzania should be a land trustee on behalf of all Tanzanians. The policy, among other things, divided the land into four categories, which are; general lands, village lands, reserve lands and urban lands. The commissioner for lands was entrusted with the responsibility regarding overall administration of all types of lands (URT, 1995). The formulation of National Land Policy of 1995 was followed by the Village Land Act No.5 of 1999 (URT, 1999). The Village Land Act was implemented through the provision of Certificate of Customary Right of Occupancy (CCRO) in order to ensure fair access to land. Despite having in place the National Land Policy of 1995 and the Village Land Act No.5 of 1999, its implementation and its subsequent amendments, Tanzania has been repeatedly facing several challenges associated with land ownership particularly in rural areas (Mugabi, 2013). This chapter therefore, seeks to pencil on the centrality of revisiting traditional

land ownership for sustainable land management using the case of the Haya people in the Northwestern part of Tanzania.

Researching the Local: The Paradox of Land “Concessions” in Tanzania

Land in Tanzania constitutes one of the fundamental four leading resources namely land, water, forest, and minerals. As a crucial resource, it affects other sectors, which are of paramount consideration to the existence of the nation state. For example, in Tanzania land is still indissolubly tied to labour as it offers employment to almost 67% of the population, through agricultural activities (Mugabi, 2013). As such, land ensures food security and national security in general. Tanzania has a total area of approximately 945,000 square kilometres, of which about 44 million hectares are arable land for agricultural activities. It is estimated that about 88% of this arable land is found in rural areas wherein about 82% of the total rural population is employed (Chachage, 2010). Despite the fact that Tanzania is blessed with huge arable land, only 23% of this land is currently utilised. This status implies that Tanzania still has chunks of unused ‘virgin land’ potential for large-scale agricultural “investments” (Theodory, 2017). Recently, the Tanzanian government has been striving to achieve socio-economic growth, for poverty alleviation. Such initiatives are evident in the agricultural sector whereas the government is ensuring that there is significant improvement of this sector, which employs more than 67% of the country’s population. The government is working together with “investors” to promote the country’s agriculture and thus, huge chunks of land have been leased to foreign “investors”, for large-scale agricultural “investment”. The premise behind this trend is that large-scale farming may transform small-scale farming and increase productivity. This is because large-scale farming employs advanced technologies more than small-scale farming hence increase in production (Blumenthal, 2009).

It is from this context that Tanzania presents a good case of large-scale agriculture “investment” in East Africa whereby more than 172 multinational corporations have seized chunks of land for

agribusiness (TIC, 2006). For example, in some districts such as Kisarawe in the Coastal Region, the lease process began back in 2005 and was sealed in 2009. In this “deal”, huge chunks of village lands (approximately 8210.68 hectares) were seized by Sun-Biofuel Tanzania Limited for *Jatropha* production to export biofuel energy abroad and not for domestic use (Kambote *et al*, 2014). Land concessions mostly focus on the “idle” land, which is deemed less significant for rural livelihoods. Such assumptions are entirely wrong as indigenous people use this land for different purposes and not merely for farming. Most of the uncultivated land in rural areas of Tanzania is critical for firewood collection, grazing of animals, source of medicinal plants and water, source of building materials and graveyards (Matondi *et al*, 2011). Thus, large-scale land “investment” mostly done by government and Multinational Corporations has ruined traditional land ownership of host communities in Tanzania. Large-scale land “investment” normally denies indigenous people access to important natural resources, undermine local livelihoods, threaten food security, and impair land tenure system of the indigenous. In this sense, they are not necessarily “investments” for indigenous people. This triggers troubles and conflicts among “investors” and the host indigenous people.

Types of Land Ownership and their Relevance among Haya Farmers

Traditionally the land in Haya community was owned by the African lineages. This land was divided into three main types namely *ekibanja*, *ekikamba* and *rweya*. The *ekibanja* is the most popular land ownership among Haya people. *Ekibanja* was used by the households for farming of indigenous crops such as coffee, indigenous banana, cassava, yams and sweet potatoes as well as other seasonal crops like beans and maize. Acquisition of *ekibanja* in Haya community took several forms including inheritance whereby a son could be given a piece of land by his father. Inside *ekibanja*, the son builds a house for his family and a cow shed for few cows. In this house, the son stores his coffee and other agricultural products such as maize and beans. Traditionally, the *ekibanja* is the centre for the nuclear family life and

the centre for the management of the farm unit, which entails several plots of *ekibanja* (*ebibanja*). The word has an emotional and social inference attached to kinship and descent (Kashaga, 2013). Usually, the father will be buried in the *ekibanja*; the oldest son will inherit the largest *ekibanja* of his father including the part where the grave is located. Despite the fact that inheritance through paternal lineage was already the dominant means of owning land in 1960s, there were also other means, such as purchase, renting or gifts from the chief or relatives. It was reported during the study that informs this chapter that the majority of Haya people had acquired *ekibanja* through inheritance from their father. The following table 1 indicates different ways of land acquisition in the study area.

Table 1: Methods of land acquisition in the study wards

Wards	Methods of land acquisition		
	Inherited from father (%)	Purchase (%)	Gift from relatives (%)
Magata-Karutanga	60	33	7
Kitobo	59	36	5
Bugorora	62	35	3

Source: *Fieldwork* (2016)

From the table above it can be seen that the major forms of land acquisition in the study wards are premised on inheritance and purchase. Land acquisition through inheritance diminishes the size of the units of the *ekibanja* available for the heirs of the coming generations. It was revealed that due to the ongoing population pressure in the study area, the only adjustment to this situation would be either through purchase of new land or migration to other villages where the land is available. It was further reported that the distribution of *ekibanja* size varies within the high rainfall zone (including areas of Kiziba, Karagwe and Kyamutwara) and the low rainfall zone (Missenyi, Kihanja and Ihangiro) areas. This is

vindicated by the size of the *ekibanja* owned by farmers in the high rainfall zone who have *ekibanja* exceeding 1.1 hectare while farmers in the low rainfall zone have *ekibanja* below 1 hectare. The implication of *ekibanja* acreage is reflected in the extent of manure added in *ekibanja* as well as mulch requirements for respective farming family. The *ekibanja* is crowded with banana, which is the dominant crop. The plot of *ekibanja* is demarcated by a certain plant called *omulamula* (“the one that judges” in local Haya language). This plant is customarily used as beacon that separate one *ekibanja* from another.

The second type of land ownership owned by the Haya was *ekikamba*. *Ekikamba* is a piece of land, which has been cultivated with perennial crops such as cassava “bilibwa”, sweet potatoes “bitakuli”, millet “omugusha”, yams “ebila” just to mention the few. This land has been left to be reclaimed by heavy weeds and grass. In the other words, *ekikamba* applies to a piece of land, which is cultivated on seasonal basis and planted with seasonal crops and has been left to be reclaimed by weeds or grass. The term in this case, however, is only used for a piece of land adjacent to the *ekibanja*. It was reported by the respondents of this study that there are many reasons why a certain plot can change into *ekikamba*. The reasons include *ekibanja* becoming too large for the household to manage to cultivate, the owner becoming too old and unable to till the whole farm. Other factors include labour shortage, illness, death, or migration of household members, as well as divorce.

The third land ownership regime among the Haya is *rweya* in Haya local language. This is an open space dominated by grass owned communally by the village authority or groups of people but the land is used freely by the local community for grazing small herds of cattle as well as cultivation of seasonal crops such as nuts, “*enshoro*”. *Rweya* sometimes exists between villages; it consists of areas permanently uncultivated due to shallow soil, rock outcrops, steep slope gradients, and areas with grass fallow after the cultivation of annual crops. The findings revealed that in most of the study villages *rweya* is used as the source of fuelwood for the villagers. Since the plots are owned communally, every villager has the right to collect fuelwood for his or her household consumption.

Land Reform and its Implications on Traditional Land Ownership

In most developing countries, land policies and regulatory frameworks have been used as an ideological instrument for upholding the unequal distribution of land and unfair ownership systems. Regulations pertaining land use are usually streamlined to protect public interests. Though there is legitimate public attention in the way land and the natural resource bases are used, the application of regulations to various tenure systems, and varied land use systems is often unfair and inequitable (Kasimbazi, 2017). In Tanzania, The recent land reform has placed traditional land under pressure and transnational corporations are increasingly competing to be frontrunners (Theodory, 2017). It is from this context that traditional land owned by indigenous Haya is targeted by such “investments”. It was revealed by this study that land grabbing in the study area is happening under the guise of land “investments”, including in game reserves and conservation areas. Land concession in the study area is sometimes undertaken without the informed consent of the local communities; hence, this results in conflicts between “investors” and the communities. It was reported in Bugorora ward that part of village land had been leased out to individual “investors”. This land was taken without effective meaningful participation, democratic planning and independent oversight from the local community. This situation was reported in Bugorora village where both local authorities and the community were unhappy with the government’s decision to convert the Ngono wetland area into a conservation area. Previously, villagers relied on that land for their livelihood, using it for grazing of cattle and agriculture. Currently, such activities have been banned in areas adjacent to the wetland. The situation is worse among villagers surrounding this wetland, as they have to do all their livelihood activities within the *ekibanja*, which in turn, triggers soil infertility and reduces its productivity. One of the participants had the following sentiment with regard to the decision of the government to convert the Ngono wetland area:

...conversion of the Ngono wetland area into a conservation area has affected our traditional land ownership. This wetland was vital to the community for agriculture especially during long dry spells. In 1997 when we were hit hardest by drought, if not for this wetland we could have died due to hunger.

It was further reported that in some of the villages such as Magata and Katanga, villagers condemned the village authorities for not being transparent when signing land contracts with various “investors”. It is not known exactly how much land has been leased out to the “investors”. Many of such deals in different villages are characterised by secrecy and lack of transparency. Majority of villagers expressed their concerns regarding the contracts, as they do not specify any clear and binding commitments for benefits to the villagers. This in turn, has triggered conflicts between the local communities and “investors”. It was reported during a focus group discussions that different “investors” have been filing complaints against villagers undertaking grazing and farming on their land. During the transect walk in Karutanga village, I met some children that were caught by one of the individual “investors” collecting fuel wood on his plot. The individual “investor” who owns 15 hectares of land had the following remarks:

...This is my land.....I don't care where the rest of the community will undertake farming.I bought this land from the village authority. I paid a lot of money to get this land and I have invested huge money in tree planation. I'm annoyed if I find anybody trying to play with my investment¹.

The above remarks show that the rural communities in the study area are increasingly becoming vulnerable because they are unable to obtain chunks of land for their livelihoods use. Rich people are favoured by the market system due to their financial capacity. The on-going situation in the study area is that rich “investors” are buying up land at the expense of the livelihoods of the rural people.

Despite the conflicts over land ownership in the study area, the government of Tanzania launched the *Kilimo Kwanza* initiatives in 2009. The focus of *Kilimo Kwanza* was to transform the agriculture sector by promoting large-scale agribusiness and also, to convert small-scale farmers into agribusiness. In order to achieve this, *Kilimo Kwanza* aimed to enhance land availability for large-scale capital “investment” and production. Thus, the government facilitated the amendment of Village Land Act No. 5 of 1999 in 2004 to create enabling environment to “investors” and individual “investors” to have easier access to village land. As of now, *Kilimo Kwanza* appears to inspire nothing but fear in small farmers who are likely to lose their traditional land especially *rweya* and *ekikamba*. The fact is that, *ekikamba* and *rweya*, which for ages have been used by the villagers for different purposes, have been taken by the large “investors” leaving them with limited land to extend their farming and grazing activities. This scenario does not appear likely to improve the livelihood of Haya people rather than increasing their vulnerability to environmental change.

During transect walks and participatory observation, it was noticed that huge tracts of land in Kabingo village have been leased to a private company known as Global Agency Limited. This company has leased more than 3,500 hectares of land for agribusiness in two villages of Buchurago and Kabingo. Though the company seized the land, following the legal procedures stipulated in the Village Land Act N. 5 of 1999, villagers were deeply unhappy with the process due to disruptions of traditional land ownership.



Photo 1: Large-scale farming in Bugorora village interrupted Haya land ownership

Source: *Fieldwork* (2016)

Concluding Remarks

The chapter has highlighted critical issues regarding traditional land ownership in African contexts. During the pre-colonial era, local people had their own indigenous systems of land ownership. In this particular period, the power to allocate the land was vested in the chiefs who had the authority over the use of land resources. The advent of colonial regimes undermined the functions of the local chiefs with regard to land administration. Land was a target of colonial regimes for production of the required raw materials like crops, forest products, minerals, and wildlife. The inception of colonial systems of land administration triggered many challenges on the land administrations within the community. Unfortunately, most of these challenges were inherited by the governments in African

countries leading to incessant conflicts over land ownership. Most of the land ownership problems that exist in African countries today have their origins in the colonial era. Colonialists did not only introduce systems of common and statutory law, working them together with a prevailed system of customary law, rather the colonialists also dispossessed and looted African land. This relegated the Ubuntu-informed customary law to lower status. It is from this context that existing land administration systems in Tanzania do not give equal rights to indigenous people to have access to sufficient land for their livelihood activities such as farming and grazing of animals. This is because the government inherited a large part of common and statutory laws from the colonial land administration. Consequently, land ownership systems today are determined by the “market forces” whereas merely rich people have access to sufficient land due to their financial capability. Thus, revitalising traditional land ownership would enhance equitable distribution of land among the rural impoverished communities. This can be a powerful initiative for upholding both economic development and environmental revitalisation. Traditional land ownership and distribution are key features through which the structure of production and power among indigenous people may be understood.

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The Man, Human Rights, Transitional Justice and African Jurisprudence in the Twenty-First Century

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Introduction

In Africa, one of the major casualties of the combined forces of “Euro-modernity”, colonialism, globalisation and liberalism is African jurisprudence. Contemporary globalisation of Euro-American justice implies an inverse negation of other jurisprudences and forms of knowing and applying justice such as those used in Afro-modernity, pre-colonial and pre-capitalist Africa. Given the resilience and stubbornness of colonialism, decoloniality is preferred here as an efficacious framework in rethinking justice, including transitional justice and how Africa needs to recraft its jurisprudence. The chapter positions Ubuntu as the basis for the development of such an African jurisprudence. By definition, jurisprudence is a philosophical inquiry into the basis of law such as but not limited to the validity of law. As a philosophy and science of the law, jurisprudence deals with the legal relations and principles upon which law is based. Jurisprudence also functions to ‘consider the unlimited effect which a law would produce over time if a specific rule was applied to an indefinite number of cases and to subsequently choose the rule which, when so applied, would produce the greatest advantage to the community’ (Black, 1968: 992). “Euro-modern” jurisprudence is Euro-America-centric and this is because of many events and factors such as colonialism, capitalism, liberalism and globalisation. The resilience, illusiveness and perpetuity of the combined negative effects of these phenomena on the (neo-)colonised peoples is termed coloniality. One of the most entrenched, resilient and destructive aspect of coloniality is western jurisprudence.

The domination of western jurisprudence is evident in the universalisation of Roman Dutch law, which has now assumed the position of the default global legal system upon which multilateral justice institutions such as the International Criminal Court and the International Court of Justice are based. While the counter-argument, that what is today known as western jurisprudence was stolen African jurisprudence, modified in the west before being re-exported to Africa as a colonial tool is valid, the fact remains that there is no resemblance between this stolen-modified-re-exported jurisprudence and the justice system that existed in Afro-modernity in pre-capitalist and pre-colonial Africa. The huge differences between the “Euro-American” rule of law and Ubuntu bears testimony to these differences. Today, the majority of the world’s domestic and international legal systems are answerable to Euro-American human rights and not to African people, as is desirable where law is supposed to be answerable to African cultural systems, norms, values, beliefs and other modicums of life. This creates further injustices in an attempt to remedy prior ones and Ernest Wamba dia Wamba (1992: 67) rightly mourned how wrong processes short changed formerly colonised peoples by noting that, ‘When a [transition] process takes off on a wrong footing, unless a real readjustment takes place on the way, the end cannot be good’. Describing Euro-American jurisprudence centric politics and transitions, Wamba dia Wamba further argued that, ‘[Political] transitions must, therefore, be redefined in terms of the change from a mode of politics in crisis towards a new mode of politics. This new politics which is to be based on African jurisprudence, dia Wamba termed emancipative politics.

In line with the book’s main objective of recrafting, rethinking and rewriting African jurisprudence, this chapter relooks at the notion of western jurisprudence by tracing the genealogy of the man, the human and Eurocentric human rights as this forms the epicentre of western jurisprudence. This project is conceived from a transitional justice premises where Africa is defined as a victim continent deserving redress for colonial harms, among other harms, which were anchored in a western jurisprudence. In motivating for an African jurisprudence based on Ubuntu, we argue that there is a

serious misalignment between western jurisprudence and African communities where western laws are still the main source of “justice”. Western jurisprudence largely defines law not only from an individual perspective as the ‘recognition and efficient protection of the rights and liberties of the individual’ (Ramose, 1999: 82) but also from (neo-)colonial robber-states’ perspectives. Here, the colonial/(neo-)imperial **corrupted individual** is the rights holder. This differs from an African jurisprudence, which is anchored on a balance between the individual and the community rights where law is viewed as the recognition of the rights of the collective. The western notion of emphasising the corrupt individual over the African collective is traced in this chapter from the origins of the concepts of the man, the human and human rights. In tracing this genealogy, we rely on the works of decolonial thinker Walter D Mignolo whose seminal work, titled *Who will speak for the ‘Humans’ in ‘Human Rights’*, forms the centre of my argument (Mignolo, 2009).

Problematising Human Rights

The major problem with Eurocentric human rights as the pillar of western jurisprudence is that while every human being is a person, not all persons are ‘man’. We argue that human rights do not apply to every person but they apply only to ‘man’. The late Iraqi President Saddam Hussein, his alleged dictatorial tendencies notwithstanding, rightly noted that ‘this struggle’ is a struggle for the right to rights, implying that while the west was fighting for what is termed fourth generation human rights such as the right to fast mobile connectivity and clean air, people in the formerly colonised world are still fighting for the right to have their basic context specific human rights to be recognised by the west. These include the right to define rights from the collective perspective and not the corrupted individual basis, the right to life, the right to restitution, the right to humanity and the right to peace. In a way, Africans are yet to be considered as humans within the international western dominated human rights domain. African lives are regarded, by the west as dispensable, and as their resources are looted, ‘man’ simultaneously denies Africans their humanity. The west’s treatment of Africa and formerly colonised

peoples has been described by Maldonado-Torres as a series of actions which ‘sustains an endless war on specific bodies, cultures, knowledges, nature, and peoples’ (Maldonado-Torres, 2016: 2). This calls for some form of transitional justice, not the liberal type championed by the likes of the International Criminal Court but a transitional justice involving restorative justice that restores the humanity of the formerly colonised peoples by inter alia, recognising African jurisprudence, laws and legal theories.

Transitional justice is here taken as the various mechanisms, institutions and frameworks implemented as Africa moves from a period of western domination and colonialism to a peaceful and sustainable self-determination. This is not a transition from eastern communism to western liberalism or a transition from one dictatorship to another but a constructive transition which gives birth to a new Ubuntu-informed humanity constituted by victors over colonisation and coloniality and not victims of especially coloniality.

In this chapter, we re-ask Mignolo’s (2009) question on the whereabouts of the human in human rights in Fanon’s zone of nonbeing. Fanon described the zone of nonbeing thus:

There is a zone of nonbeing, an extraordinarily sterile and arid region, an utterly naked declivity where an authentic upheaval can be born. In most cases, the black man lacks the advantage of being able to accomplish this descent into a real hell (Fanon, 1952: 2).

Using Mignolo’s thesis on the *humanitas/anthropos* the chapter traces the genealogy of human rights from the 14th century European Christians who are regarded as having invented the terms ‘man’, ‘human’ and ‘humanity’ as ways of distinguishing themselves from the “Barbarians”, “Saracens”, “heathens” and other “pagans” (Mignolo, 2009: 8). My central argument is that the much Western media reported failure to uphold human rights, especially in Africa, is a paradox since the African *anthropos* who exist (not live) in the zone of nonbeing cannot suffer human rights abuses when they are in fact regarded as ‘non humans’. Non-humans cannot suffer human rights abuses. The African *anthropos* were pushed by “Euro-modernity” and

(neo-)colonialism such that they now exist outside the domain of 'man', 'humans' and 'humanity' (*humanitas*).

A direct response to Mignolo's question on the whereabouts of the human in human rights and by extension the whereabouts of human rights in Africa is that human rights in Africa, if they are missing, were stolen by the western colonisers. The western colonisers did three things to Africa's human rights: steal, misrepresent and demonise. Those components of African human rights that were palatable with the colonisers, they stole; those parts that they could not deal with, they demonised and those parts that were resilient, they misrepresented.

Regarding the aspect of transitional justice, our argument is that western-centric transitional justice, defined an array of instruments and mechanisms used in post-conflict and post dictatorial states to deter future abuses, seek historical accountability and achieve a consensus on truth and reconciliation, among other goals (Benyera, 2015:199), is a perpetuation of the marginalisation of formerly colonised people predominantly by the west and western donor institutions. Transitional justice programmes are predominantly conceived and funded from the west while they are predominantly implemented in the global south. This is no coincidence. The same countries that colonised are now responsible for conceiving and funding transitional justice programmes in their former colonies. While this may pass as pure western benevolence, we argue that such acts are clearly designed as part of a grant scheme to perpetuate the subjugation of the global south, a notion termed coloniality, specifically coloniality of power.

Towards the end of this chapter, we use the example of indigenous Australians to illustrate that not all people are regarded by the west as 'human'. The conclusion of the chapter is that as aptly stated by Mignolo, while people are born equal, their equality ends at birth. However, this is not because of human rights abuses as often argued in liberal scholarship (Taylor and Williams, 2002; Howard-Hassmann, 2010) but because people assume an inscribed ontological density which is a product of centuries of marginalisation, conquest, oppression, dehumanisation and what Franz Fanon, Sylvia Wynter and Aimé Césaire termed 'thingification' (Fanon, 1952;

Wynter, 2003; Cesaire, 1955). Briefly, the lived conditions of the formerly colonised persons have never improved because mainly of coloniality. Coloniality operates by ascribing responsibilities used in perpetuating ‘thingification’, among others, not to countries but to institutions such as the United States Agency for Development (USAID), the International Criminal Court (ICC) and many other. These western institutions are major players in the transitional justice landscape in the global south and by their design, have no similar role at home in the west. A case in point is the relationship between the ICC and the United States of America (USA), in which the USA through its role in the United Nations Security Council (UNSC) refers alleged human rights abusers to the ICC, which it ironically does not allow to prosecute any American citizen. This is because Americans are part of the *humanitas* and those suspected of gross human rights abuses, which the USA refers to the ICC, are part of the *anthropos*.

Of *Humanitas* and *Anthropos*

Rudimentary, the world is inhabited by two species of people, the *humanitas* and the *anthropos*. An ideal entry point into this discussion is therefore to depict the character of the *anthropos*. We will quote from Puerto-Rican Sociologist and leading decolonial thinker, Ramon Grosfoguel who wrote:

We went from the sixteenth century characterization of ‘people without writing’ to the eighteenth and nineteenth century characterization of ‘people without history,’ to the twentieth century characterization of ‘people without development’ and more recently, to the early twenty-first century of ‘people without democracy’ (Grosfoguel, 2007: 214).

The above quotation depicts a people in perpetual deficiency of something deemed essential for human survival. As a people, the (neo-)colonised have been assumed by the west, who happen to be their former colonisers, to lack most essential necessities of humanity such as writing, history, development, democracy and recently

human rights, transitional justice and jurisprudence. How do we, as (neo-)colonised people of the global south lack human rights when these are supposed to be universal? On the contrary, and as correctly argued by Mignolo, Eurocentric human rights are not at all universal (Mignolo, 2009: 7–8). The much celebrated Universal Declaration of Human Rights is, contrary to common belief, not universal at all. The fact is that not all people are considered part of humanity. Mignolo (2009: 10), divides human beings into two distinct categories, *humanitas* and *anthropos*. *Humanitas* live in the west, also known as Euro-North America while the *anthropos* live in the (neo-)colonised world, which include Africa, Latin America and Asia.

In fact, the majority of the world's population resides outside the realm of humanity and are therefore in need of transitional justice as they transition from a combination of colonialism, communism and coloniality to a lived experience of their choice. Their lived experiences are not assumed to qualify them to be classified as humans yet, hence the need for them to transition towards Eurocentric humanity. This position is not coincidental but deliberate and well-crafted coloniality. It is a result of centuries of a series of well-orchestrated moves, which resulted in a world with more inequality, robbery, more suffering and more poverty. While Montesquieu is correct in asserting that we are all born equal and that the reality is that our equality ends there, i.e. at birth, (Montesquieu, 1748 (1989): 132) it must be added that it is at birth that we are ascribed with a corresponding ontological density. This density is corresponding to one's condition, i.e., as part of either the *humanitas* or the *anthropos*. Needless to mention that Montesquieu was not correct in asserting that, '...society makes them lose it (equality), and they recover it only by the protection of the laws' as it is the western jurisprudence originated laws which are used to make (neo-)colonised peoples lose their equality.

For the *anthropos*, from birth onwards, their life is characterised by inequality, unfairness and subjugation by the powerful, a situation Thomas Hobbes aptly characterised in 1651 as the state of nature (Hobbes, 1998). Montesquieu described this situation in *The Spirit of the Laws* as a state of nature inhabited by humans who possess a

distinct predisposition to preserve themselves first and foremost (Montesquieu, 1748 (1989): 643).

This chapter asks two critical questions: if the Universal Declaration of Human Rights gives all the humans equal rights, i.e., the right to have rights, at what point in history did some humans lose their rights? Secondly, what defines humans and rights? Put differently, at what point in history were humans and rights defined, by whom and for what purposes. Such introspections allow us to put into perspective the challenges facing western-centric jurisprudence. The chapter also endeavours to respond to the question posed by Nelson Maldonado-Torres when he questioned, what is the human? This inquiry is necessary because according to Maldonado-Torres:

Theorising the human continues to be relevant because the current understanding of the human is largely based on a partial and provincial perspective based on European humanity (Maldonado-Torres, 2008: 104).

Knowing and locating the human, hence nonhumans by exclusion, is efficacious in explaining the contemporary lopsided transitional justice landscape in which others develop, fund and administer while others merely consume. The next section explores the challenges facing the field of human rights of which transitional justice is a part.

What are the Challenges Facing Human Rights Today?

Probably the most misused and abused term in modern days after democracy is Euro-American human rights. In practise, Euro-American human rights have been privileged over human life to a point where human life is lost in the defence of Euro-American human rights. Cases in point are the many deaths of Afghan and Pakistan civilians as a result of being bombed by the United States of America's unmanned aerial vehicles (UAV), commonly known as drones (Hudson, Owens, and Flannes, 2011). This is the tragedy of modern day democracy. Euro-American human rights are no longer an end in themselves but a means towards an end. They have now

become instrumentalised such that the pursuance and preservation of the human rights of the *humanitas* is being used to perpetuate coloniality. This is done in various ways such as the turning back of refugees seeking to migrate to Europe from war torn and economically impoverished parts of the world such as Syria, Pakistan and Iraqi. Thus, in practise, human rights were never a universal value but the exclusive preserve of the *humanitas*.

As a concept, Eurocentric human rights is schizophrenic, it is afflicted with bipolar as it sees it perfectly logical to destroy human life in Afghanistan in the defence of human rights in the United States. However, at what point in history did human rights assume this evil character? This question will be attempted in the next section via the historicisation of ‘the man’ who is the central character in human rights, transitional justice and jurisprudence.

We contest the views of western liberal scholarship and institutions that the African *anthropos* lack human rights. The African human rights philosophy of Ubuntu still exists notwithstanding the colonial onslaught, which it still experiences in the form of coloniality of being. One aspect of the African way of life stolen by the colonial thieves was African philosophies of humanness. Colonial thieves misappropriated, misrepresented, and demonised Ubuntu. This was in an effort to create compliant colonial subjects who doubt themselves and go to the extent of hurting and hating themselves.

Historicising ‘the Man’

The debate regarding the origin of the notion of the human in human rights is driven by what Saddam Hussein aptly termed, the ‘right to have human rights’ which is often taken for granted by those who are born already endowed with such a right to rights. It must be stressed that while the *humanitas* are born into a race pre-endowed with human rights, those outside the realm of the *humanitas*, i.e., the *anthropos* have to fight, one way or the other, for their rights to be recognised, often with little or no success. This is so mainly because those born with or who stole rights do not voluntarily want those born without or robbed of the same rights to join them in the ranks of the *humanitas*. This falsifies the claims of the universality of

Eurocentric human rights. What therefore is the origin of the notion of human rights as an invention of a particular society at a particular time in its existence?

Mignolo rightly traced the troubles facing the notion of Eurocentric human rights to its birth. For him, Eurocentric human rights were born the day that 15th and 16th century Christian humanists invented the terms ‘man’ and ‘human’ (Mignolo, 2009). According to him, this was done as a necessity in distinguishing Christians from ‘man’, then later extended to differentiate ‘man’ from other communities and societies that were perceived to be hostile to ‘man’. Such societies and communities, he continued, included but were not limited to pagans, barbarians, Saracens, Heathens and Easterners. Thus, there was a clear distinction between ‘man’ and ‘others’. Put differently there was a frontier between the civilised people and the uncivilised people who consisted of various groups such as the pagans, the barbarians, the heathens, the Saracens and others outside of man’s civilisation. Accordingly to Headley, the cardinal divide between the *humanitas* and the *anthropos* is the notion of civilisation; which was accompanied by two other notions; that of Europe and that of a European civilisation (Headley, 2008: 65). The notion of Europe created the present day common European identity as early as 1500, followed by that of civilisation in which sections of Europeans projected themselves as being more civil and hence superior to the others. In the late 16th century, European civilisation consolidated the two preceding notions of Europe and civilisation which was centred on what Headley termed *christianatas* (Headley, 2008). For Headley, right from the onset, there is a clear relationship between being civil, being human and being Christian. He wrote:

Humanity, having been first identified with membership in the civil Roman community, after 380 CE was reinforced by association with the Christian church. The ideas of civility, humanity and Christianity moved together ... (Headley, 2008: 68).

At this early stage in the development of the notion of the ‘human’, one can already notice a loose correlation between a westerner and humanity. This exists by the mere categorisation of

Easterners not as ‘man’ but something else other than ‘man’. Another trait, which emerged at this early stage, was the west’s self-appointed right to name and categorise without being named or categorised in return. This translates to the right to exclude. This behaviour persists today with the same westerners initially calling those in the global south as ‘the colonies’, ‘the third world’, ‘the developing countries’, ‘emerging democracies’, ‘emerging markets’, etc. The bottom line is that those who possess power also possess the right to name and categorise. They also have the right to institutionalise their views which are then presented to the categorised as knowledge which ought not be questioned but consumed. This in part constitutes a combination of coloniality of knowledge and coloniality of being.

Nelson Maldonado-Torres agrees with Mignolo that the *humanitas/anthropos* dichotomy is of Christian origin with Maldonado-Torres noting that, ‘it is true that in the Renaissance, human beings were conceived through the lenses of Christian discourse...’ (Maldonado-Torres, 2008: 106). Sylvia Wynter also shared the same view about the cardinal point in the creation of the *humanitas/anthropos* dichotomy and believes that the Renaissance period was crucial as it witnessed Christian Europeans beginning to shift from a God centred worldwide to one characterised by ‘themselves’ and ‘others’ (Wynter, 2003: 257–337). In that regard, 1492 becomes a significant date in the genealogy of Eurocentric human rights and transitional justice as it is when the *humanitas* ‘discovered’ the *anthropos* in what became known as the new world. It is important to note that whatever the ‘discovered’ people did prior to being ‘discovered’ was considered to be behind as opposed to being parallel to western civilisations. It is these ‘discovered’ people who fill the rank and file of the *anthropos*. It is the discovered people who are also assumed to lack human rights, democracy, development and experience transitional justice as conceived, funded, monitored and evaluated by the west. Needless to mention that such transitional justice is conceived from a western jurisprudential viewpoint, which emphasises corrupt individual rights over group rights.

Normally when one classifies, the next logical endeavour is to order the components that constitutes the classes. This classification of humans into ‘man’ and ‘others’ leads to the Eurocentric

hierachisation of people. As argued by Grosfoguel, at the top of this pyramid are male white Christians while at the bottom are black women (Grosfoguel, 2012: 9–33). The bottom line of the classification and hierachisation of people is that white male Christians are closer to God, while black females are closer to the animal kingdom. According to this analysis, white man's pets are located between blacks and whites as they enjoy better lives than some blacks. The closer one is to God, the more rights they enjoy and vice versa.

Unpacking the 'Human'

According to those who developed the notion of the 'human', i.e., early European Christians, the human is made up of two components, the body and the intellect. This gives rise to a couple of combinations. Firstly, there are those with the mind and the intellect, these are called humans, *humanitas*. Secondly, there are those with a body and less intellect, these are the *anthropos* and they are the ones who have to be policed and regulated through the institutions such as the International Criminal Court. While the Greek word *anthropos* means human beings, *humanitas* deploy the term differently. Antony Bogues traces the origins of the *anthropos* to the understanding of civilisation (Bogues, 2012: 35). He argues that the major difference between the *humanitas* and the *anthropos* is that the *anthropos* is perceived to be uncivilised by *humanitas*, which then perceives itself to be civilised. He further contends that with this distinction, The Humanities evolved to be a subject of the study of the 'civilised' while Anthropology became the study of the 'uncivilised'. This explains why Anthropology syllabuses mainly studies non-western cultures and societies located in the zone of nonbeing, i.e. the global south. Common anthropological subjects include the Maori, the indigenous Australians, the Herero of Namibia etc. This argument is aptly summed up by Bogues when he contended that:

My point is a fairly straightforward one: that the creation of the figure of the human in Western thought occurred at the historical moment of colonial conquest and the emergence of the European

colonial project. Thus, the figure of the human was constructed through conceptions of human difference already classified into hierarchical schema (Bogues, 2012: 35).

In other words, the *anthropos* and *humanitas* are divided by an abyssal line with the *anthropos* existing in the zone of nonbeing. The zone of nonbeing is therefore a theatre in which all sorts of evils play out. These include slave trade, colonisation and the darker side of western modernity (Ghisso and Campano, 2013; Maldonado-Torres, 2011; Mignolo, 2002). In the zone of nonbeing, de Sousa Santos argues that life is characterised by regulation *and transitional justice* while in the zone of being is characterised by emancipation *and human rights* (emphasis mine) (de Sousa Santos, 2007: 46). Those with human rights do not need transitional justice because they have nowhere to transition to. It is those in the zone of nonbeing who need transitional justice in order to transition to the zone of being so that they also can enjoy human rights.

This is the logic behind the fact that the ICC has so far prosecuted only Africans in a world full of dictators and genocidaries. These subjects of the ICC (Africans) do not only lack intellect, but also democracy and human rights. Put differently, those with less intellect are assumed not to belong to humanity hence they can be dispensed, enslaved, colonised, bombed, etc. These series of catastrophes, which appear to be unrelated, befell the people in the formerly colonised world one after another and are not unrelated at all. They form part of a system and logic to deny 'others' their humanity. Maldonado-Torres termed this phenomenon the Imperial Manichean Misanthropic Scepticism (Maldonado-Torres, 2007: 245). It is the very act of not only doubting but also refusing the humanity of other people other than you, especially blacks from Africa. Instead of accepting them as part of humanity unconditionally, they are subjected to a long, agonising and endless transition.

There is a direct link between rights and colonisation, of which colonialism instituted the atrocities that transitional justice is assigned to deal with. According to this view, western centric transitional justice is the process of cleaning up western colonial mess. The practice of colonisation saw those who thought they monopolised

rights colonising those assumed to be without rights. In fact, it was assumed that the colonisers had the right, as part of their human rights, to colonise the subsequently colonised. How does one exercise their human rights while in the same process expressly denying others their rights? The answer lies in the logic that those enslaved, colonised and dispensed were not considered to be 'human' like the colonisers. Eurocentric human rights are part of the logic of colonisation in which certain people, the *humanitas* had rights and others, the *anthropos* did not, for example, slave owners had the rights to own slaves while slaves had no right to civil liberties. Eurocentric human rights are therefore not an open cheque but rather a preserve of a few privileged people who have been identified and named in the preceding sections.

Suffice to mention that the classification and distinction of 'human' from others marks the origin of what Boaventura de Sousa Santos termed abyssal lines (de Sousa Santos, 2007: 45–89). These lines divide *humanitas* from *anthropos*, for example. These abyssal lines persist even today and are at work daily marshalling and disciplining the *anthropos* once they try to cross these lines. The case of African and other immigrants being denied entry into Europe and the United States is a case in point.

In principle, Eurocentric human rights are written and codified. These include the International Bill of Rights as constituted by the trilogy of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. In practice these rights are inaccessible to the *anthropos* because the *anthropos* lack the power to enforce and hence to enjoy these rights. Having rights in principle is one thing, having the capability to enjoy and defend those rights is quite another. The logic is that if you are economically poor or militarily weak, you cannot agitate or defend your rights, hence in a way the existence of your rights amounts to non-existence because you lack the capacity to enjoy, enforce or defend them, if need be. The case of the Palestinian statehood and Afghanistan's' right to peace are cases in point.

Euro-American Human rights arose not out of the blues but as an imperial necessity, a necessity to distinguish supposed humans

from those who were assumed to be less human and in practical terms, those with rights and those with no rights. This became the justification for treating those classified as less or non-human in what was termed *thingness* by Fanon (Fanon, 1960: 14) and *thingification* by Césaire (1955: 21). Until today, Euro-American human rights remain an imperial tool. It is a tool for killing the formerly colonised and the militarily and economically weak people.

In Africa and Asia, human rights evolved to become a site for the fight for all forms of equality. One such fight was the fight for equality between citizens and foreigners. Such a contestation is traceable to the birth of the concept of ‘the citizen’ because ‘the citizen’ was born with rights, which the non-citizen, i.e., the foreigner does not have. Thus while the Republic of South Africa belong to all who live in it (Ndlovu-Gatsheni, 2007: 8–9), all who live in it do not enjoy the same rights. Human rights and transitional justice are therefore not a solution to the problems of the formerly colonised peoples but a part of the problem, as they constitute coloniality of power. We will explain this relationship in the next section.

Coloniality of Power and Human Rights

It is necessary to point out that the Universal Declaration of Human Rights emerged simultaneously with the classification of the world by the western powers into the first, second and third worlds. By classifying themselves as the first world, what the west was doing was to create a system in which those other than the first world will be perpetually aspiring to be like the first world. According to Mignolo, the first world is the residence of humanity par excellence. Mignolo is therefore correct in asserting that, ‘it was from the west that the rest of the world is described, conceptualised, and ranked’ (Mignolo, 2005: 33).

The second and third worlds are thought to be inhabited not by humans but by *anthropos*, Mignolo postulates (Mignolo, 2009: 17). As alluded to earlier on, this reasoning gave rise to Anthropology as a study discipline, i.e., the study on non-human, non-westerners, i.e. Africans, Latin Americans, Asians and their kith and kin who reside outside the realm of humanity in the zones of nonbeing. The British

or Irish thus will never be the subject of study in the discipline of Anthropology. What is studied are the Maori, the Zulus, Ndebeles, Shonas, Lozis, etc. The humans who live in the first world are surrounded by the second world, which is full of 'dangerous former communists' and the third world which is yet to be civilised. Hence, the 'dangerous and the civilised' cannot enjoy the same rights with civilised humanity. This also explains why the first world is the giver and regulator of human rights and transitional justice. The same logic informs us that it is these dangerous and uncivilised people who require transitional justice and the International Criminal Court. This logic is efficacious in exposing the ICC's obsession with Africa.

Since the concept of humanity has both philosophical and anthropological categories and justifications which are of a western origin, non-westerners have the conditional right to use/claim their rights as long as they clearly mention what/which rights they will be claiming. Acceptable forms of rights the *anthropos* can claim include indigenous rights, minority rights, customary rights etc. These acceptable rights for the *anthropos* are even codified by the United Nations and include the following: the 1923 Declaration of the Rights of the Child, the 1975 Declaration on the Rights of Disabled Persons, the 2001 Universal Declaration on Cultural Diversity, the 2007 Declaration on the Rights of Indigenous Peoples. It is noteworthy that the subjects of these declarations are mainly the *anthropos*, mainly located in the zone of nonbeing.

It is not by coincidence that the *humanitas* does not need these declarations in order to claim and enjoy their rights. This list also includes transitional justice, which is a form of justice meant to be claimed primarily by the weak. As will be argued later, transitional justice mainly does not apply to powerful nations and communities simply because it is not possible to violate them in the first place. Put differently, they are more often than not the approvers and dispensers of violence. Hence, the world's most powerful nations such as the United States of America and Israel are not part of the Rome Statute setting up the International Criminal Court, yet the United States actively participates in the referral of alleged human rights abusers to the Court. The logical conclusion is therefore that the ICC does not target Africa, it was created for Africa (Benyera,

2017). Of the P-5, only France and the United Kingdom are members of the ICC leaving China, the USA and the Russia Federation out of the ICC's reach. This is worrying because the United Nations Security Council, which is a political body, has great influence over a legal institution, the ICC. Russia, the USA and China are non-members of the ICC yet exercise such power as to refer other non-parties for possible prosecution, and have the power to defer any investigations or prosecutions. The operations of the ICC signify the zenith of coloniality of power. This is operationalised when *humanitas* holds the *anthropos* accountable to standards that the *humanitas* are not part of.

In the human rights discourse coloniality of power evolved around three cardinal events. Firstly, the rebuilding of Europe after the Second World War and the holocaust. Secondly, the growing communist problem and finally the uprisings in the colonised countries (Mignolo, 2009: 16). These events, uncoordinated as they may appear, in fact hardened and sophisticated coloniality. The system of coloniality managed to adapt to these challenges and found a way of surviving the communist threat and the decolonisation calls from Africa and Asia. Coloniality of power achieved this by creating an interwoven system of matrices of power networks, mechanisms and institutions that marshal their interests long after official colonialism ended. These mechanisms include passports, identity cards, visas, etc. while the institutions include banks, armies, intelligence organisations, schools, churches, universities, colleges among others. Part of these institutions and organisations dispense transitional justice, seemingly in an innocent and benevolent manner. Examples include United States of America based think tanks such as the International Centre for Transitional Justice, the United States Institute for Peace, the United States Agency for International Development (USAID) and the Centre for Justice and Accountability.

The best example of how coloniality entrenched itself was witnessed when the cold war ended. The second and third world countries were deemed to lack development and democracy now that communism had officially ended. The end of communism saw the recalibration of human rights as they became twinned with

development. As a phenomenon, development only occurs in the second and third worlds with the first world creating the institutions to deliver the development and enhance democracy in these underdeveloped and undeveloped nations inhabited by the *anthropos*. These institutions include the World Bank Group and the International Monetary Fund.

In a rapidly globalising world in which democracy and capitalism are the watchwords, there was no excuse, ideologically or otherwise for the second and third worlds where the *anthropos* reside not to 'develop', we are told. Without democracy, the argument goes; the integration of the *anthropos* into the global village would be problematic. Of course, the 'village' has its headmen, rules, regulations and being members who joined the 'village'; the second and third worlds have to abide by the rules of the new global 'village', one of which is the unequivocal demand for second and third world countries to transition, democratise and develop (play catch up). What is illusive in this scholarship is the qualification of what the first world implies by development of the second and third worlds. The term development did not denote only the building of clinics and bridges to first world standards but also to 'develop' the *anthropos* to first world standards, i.e., uplift the intellect of the formerly colonised peoples. Of course, western education, especially through the benevolent dishing out of scholarships, is the favoured mode of academically 'developing' the *anthropos*. This constitutes a hidden form of transition from second and third worlds towards the first world. Ndlovu-Gatsheni is correct in noting education as one of the ammunitions of coloniality when he stated that:

Schools, churches and even universities, contributed towards the invention of the 'other' as they operated as technologies of subjectivation that naturalised Euro-American epistemology as universal, neutral, objective, disembodied, and absolutely truthful. What ensued from here was 'epistemicide' which manifests itself in various ways: first is academic mimetism/intellectual mimicry dominant in African scholarship; destruction of indigenous African knowledges; and a plethora of crises plaguing universities in Africa (crisis of identity, crisis of legitimacy, crisis of relevance, crisis of

authority, epistemological crisis, crisis of student politics and crisis of historical mission (Ndlovu-Gatsheni, 2013: 55).

As a concept, development was invented and perfected over time to a point where it is an integral component of western jurisprudence. Its invention witnessed the proliferation of non-governmental organisations (NGOs), most of which are leading players in the human rights and transitional justice landscape. NGOs are a product of neo-liberalism as they did not exist prior to 1945 when they were officially recognised in the United Nations Charter (Mignolo, 2009: 18). With the entrenchment of development, democracy and globalisation, the gap between the poor and the rich widened at arithmetic rates, so did the gap between the *humanitas* and the *anthropos*. The violations of human rights increased in the second and third worlds especially as (neo-)colonialism became entrenched thereby necessitating the work of the NGOs which was essentially to ‘clean the mess and damage’ created and caused by (neo-)colonialists, western driven democracy and the concomitant development projects (Mignolo, 2009: 18). These development, democracy and justice sponsors such as western NGOs, think tanks, consultants and research organisations treat the global south as their client states and communities. This is akin to a patron client relationship in which the global south has to be taught how to transition, what mechanisms to use, when to transition, where to transition etc. Such is the logic behind the development by the USAID of the *Handbook of democracy and governance program indicators* (August: 1998) and other related tools, kits and best practises.

Transitional Justice as a Mourn of the Weak

Transitional justice is an integral part of human rights, themselves being anchored in jurisprudence, which in turn is determined by the dominant mode of politics. Transitional justice as a practice is predominantly found in weak states and communities such as those in Africa, parts of the Middle East, Asia and Latin America. As alluded to earlier on, it is not a coincidence that there is no talk of transitional justice in countries such as Israel or the United States of

America. Both are not members of the International Criminal Court for the simple reason that they claim that they have the capacity (legally or otherwise) to enforce their rights. In other words, they claim to belong to the *humanitas*. Inversely stated, transitional justice applies mostly to the *anthropos*. Siba N’Zatioula aptly captured the paradoxical relationship between the *humanitas/anthropos*-coloniser/colonised as contained in the processes of decolonisation by stating that:

The first is that only the rights sanctioned by the former colonialists were accorded to the colonised, regardless of the needs and demands of the latter. The second paradox is that the rules and procedures of decolonisation were determined and controlled by the former colonial power to effect specific outcomes. This is a paradox because the right to self-determination is generally understood to mean the absolute political authority to create rights and obligations for oneself (in Mignolo, 2009: 13).

The *humanitas* created rules upon which the *anthropos* were to be colonised (at the Berlin Conference) and decolonised. This is akin to slave masters designing rules upon which the slaves were to fight the slave masters for their freedom. The above situation attests to the futility of decolonisation and exhibits the existence of coloniality. Under these managed circumstances, transitional justice, whether transitioning from colonialism, apartheid, civil war, proxy war or communism remains a perpetual and painful transition in which the rules of the game are designed by non-players and keep changing.

Transitional justice constitutes a type of fraud for the formerly colonised people because it legitimises coloniality. After the institution of truth and reconciliation commissions and other transitional justice mechanisms such as amnesties and pardons (granted in the interest of peace), nation building is believed to ensure. Most importantly, communities are believed to be healed, reconciled and ready to forge ahead. Missing in this analysis are the former colonisers and agencies of the former illegal regimes. Were they healed of racism, slavery, colonialism, *thingification*, etc. or they simply metamorphosed into a new form. The argument being put

forward here is that, in the case of South Africa, transitional justice actually acted as a vehicle for erasing the atrocities committed during apartheid while safely transporting and delivering the perpetrators of apartheid into coloniality.

As contended by Benyera, transitional justice has achieved industry status comprising teams of experts, consultants, standardised software packages, data management tools and a set of assumptions regarding how to do work around issues of memory and why memory matters in the healing process (Benyera, 2014: 41). Looking at the financial aspect of the internationalisation of transitional justice, Oomen noted that funds transferred to ‘developing’ and ‘transitional’ states under the headings of human rights and legal and judicial development grew from less than US\$500,000 in 1988 to US\$581 million in 2002 (Oomen, 2005: 887–910). This affirms the top-down one-size-fits all nature of universal solutions to transitional justice. According to Thomson and Jazdowska, this narrow approach ignores the pressing need to engage societies more deeply and to assist them generally through their transition from human rights abuse to democracy (Thomson and Jazdowska, 2012: 85). Characteristically, the internationalisation of transitional justice draws attention away from the vast majority of victims, ignores their complex array of needs, overlooks the problem of ‘primary community interface’ whereby victims, in some situations, continue to live with perpetrators in their midst. Western jurisprudence is incapable, by design or intent, of dealing with these complex issues, which affect the formerly colonised peoples hence the need to rethink and argue for an African jurisprudence.

Are Aborigines Human?

As part of the peroration of this chapter, we intend to further my argument by exemplifying how the *anthropos* have been treated by the *humanitas*. The unnamed Aborigines of Australia and their relationship with the white Australians will be used. We argue that the Aborigines are unamend because their supposed name, ‘Aborigine’ simply means a person, animal, or plant that has been in a country or region from earliest times. The word the Latin *aborigines*,

itself made up of two components, *ab* (from) and *origo* (origin, beginning). Strictly, an aborigine can be anything from a tree, a flower, an animal, fish or even rocks. As long as it is still in its original geographic area. As will be argued later, this practice of grouping people, fish, animals and trees together under one name fits into the colonial system of treating the Koori, Murrawarri, Wangai, Murri, the Ngunnawal and many other Australians now classified as ‘aborigines’ as animals. Hence, we refer to these people collectively as indigenous Australians and not aborigines.

The indigenous Australians have been treated by the Australian government legally not as human beings, but something other than themselves. This started in the early 1840s with the colonisation of Western Australia, which brought the indigenous Australians population of Australia into contact with white westerners. Naturally, the indigenous Australians resisted this colonisation and uprisings ensued. These uprisings were ruthlessly put down and the indigenous Australians became a source of cheap, if not free labour, their land was stolen and their marginalisation was inaugurated.

The colonisation which the indigenous Australians experienced was a different kind of colonisation but one that downgraded them to the ranks of animals and fish. This position was formalised in 1893 when the Western Australia Government enacted the *Education Act*, which explicitly excluded indigenous Australians from state education. A separate department called the Aborigines Department was set up through the enactment of the *Aborigines Act of 1897*. Subsequently the indigenous Australians reached the intended destination when in 1909 the Department of Aborigines and Fisheries was formed. In essence, for the Australian *humanitas*, Aborigine = fish. According to the logic of this department, fish that are wild animals had to be managed by the same people who also managed the indigenous Australians. The question is: why and how do you manage people and fish at the same time without treating the people as fish, i.e., wild animals. By extension who should manage who? This notion of managing others is the very basis of coloniality where one group has control over others.

It is beyond racism to create a department to manage people in their land. What exactly about the indigenous Australians, which

needed to be managed, if they were seen as people, because only animals can be managed so that they behave according to the desires of their handlers? It can be argued that the idea of controlling the indigenous Australians like wild animals was the logic behind the creation of the concentration camps between 1881 and 1940. These camps were deliberately created to be sites of genocide where indigenous Australians would perish *en masse*. The *Aboriginal Act* was a genocidal law, which aimed to slowly exterminate the indigenous Australians in these controlled environments called concentration camps. Once the *anthropos* were extinct, then the *humanitas* intended to inhabit Australia unhindered, less the stress and labour of managing the indigenous Australians.

This explicit animalisation of indigenous Australians formally continued until as late as 1967 and was executed through such activities as the removal of Aboriginal children from their parents. Only in 1967 did white Australians hold a referendum to formally recognise indigenous Australians as Australians, i.e., the *humanitas* had to vote whether they wanted the *anthropos* to be recognised at law as people. One shudders to think what would have happened had the referendum failed to amend the constitution. The passing of the referendum notwithstanding, the indigenous Australians were not recognised as equal under the law until the passage of the *Racial Discrimination Act of 1975*.

The indigenous Australians were colonised, conquered, treated as animals, fish to be specific, denied education, exterminated, and denied citizenship in their own country by foreigners. The foreigners had to agree to legally recognise indigenous Australians as Australians in a referendum even though current events testify to the fact that such recognition has not changed the fate of the animalised indigenous Australians who still live a life of perpetual marginalisation and *anthropolisation*. Put differently, in reality and not on paper, the indigenous Australians do not have human rights. The reason is simple; they are not human. This constitutes the fate of the *anthropos* in the hands of the *humanitas*. Coloniality makes sure that this animalisation continues, since colonialism never ended, but it merely adapted to contemporary threats and mutated into something different yet still saving the same purpose.

What then is the current form of coloniality? The answer lies in the history and trajectory of the marginalisation and animalisation of the *anthropos*. Ali Mazrui traced this trajectory from what he termed the hemispherisation of the globe (Mazrui, 2002: 13–24). Sholte defines this notion as, ‘a dynamic whereby the social structures of modernism (capitalism, rationalism, industrialism, bureaucratism, etc.) are disseminated the world over, normally destroying pre-existent cultures and local self-determination’ (Sholte, 2000). Hemispherisation was followed by slave trade, then colonialism, decolonisation and finally the current phase of coloniality. According to this trajectory, the *humanitas* still control global affairs, not always through war but through carefully created institutions, which masquerades as multilateral, yet they are instruments of coloniality. The five victors of the Second World War run global affairs through the United Nations Security Council. As these *humanitas* decide global affairs with their veto power, the *anthropos* will be engaged in endless and ineffective ‘debates’ in the ceremonial United Nations General Assembly.

Towards an African Human Rights Jurisprudence through *Hunhu*

In this section, we refute the notion that Africa is a place awash with human rights abuses perpetrated by Africans. Those Africans, especially African leaders who perpetrate human rights abuses are products of colonialism and they use colonial methods to run post-colonial states. This is the case with Zimbabwe’s past President Robert Mugabe who once declared that he had degrees in violence (Blair, 2002). Our aim here is to foreground African notions of *hunhu*, Ubuntu and humanness in order to develop an African human rights jurisprudence. We argue that Africa is a place full of humanity and humanely behaviour, one where human rights abuses were curtailed by the use of education, socialisation, taboos, customs, philosophy and value systems.

As alluded to by Mawere and van Stam, *hunhu*’s nomenclature varies across geography with the many Nguni languages of Africa having their local variations of *hunhu* such as *Ubuntu* for the Xhosa,

uMunthu in Chichewa, *Botho* in Tswana, *Vumunhu* in Tsonga and *Utu* in Swahili (Mawere and van Stam, 2016: 290). By definition, *bunbu* is a way of life anchored in an epistemology wherein members are guided in their operations by putting themselves in the position of the other. Resultantly *bunbu* was described as a positive ever becoming, convivial and mediating the complex interplay between the individual's rights, freedoms, and the concomitant responsibilities. *Hunbu's* becoming is different from the neo-colonial becoming which is characterised by the *anthropolisation* of Africans. Neo-colonial becoming is a negative becoming and is about Africans becoming unruly, unlawful, undemocratic, animalised and the dispensable and disposable other. In a nutshell and in contrast, *bunbu* is a moral compass efficacious in various spheres of life such as but not limited to business, religion, politics and law, education and management (Mawere and van Stam, 2016: 290–291). It is the Afrocentricity of *bunbu*, which lands it favourably as a solid ground on which to build an Africa jurisprudence. It is envisaged such a jurisprudence is what is needed for Africa to build a just society, one described by Wamba dia Wamba as being beyond elite politics and emancipatory (Wamba dia Wamba, 1992: 67). In Latin America, the same was also described by Enrique Dussel who noted that 'the processes of emancipation from colonial mercantilism' began as way back as 1776 (Dussel, 1985: 11).

In arguing for the formalisation, recognition and destigmatisation of an African jurisprudence as both a liberatory and emancipatory jurisprudence, we begin by exploring whether African law exists. Such that if it exists, it will be used for the resuscitation and development of an African jurisprudence. There are two ways of testing if African law exists, i.e., the empirical inquiry and the philosophical inquiry. If law is defined as the recognition and efficient protection of the rights and liberties of the individual then it can equally be argued that there is no African law since African law recognises and protects the rights and liberties of the group and not of the individual (Ramose, 1999: 82). This is based on the reality that in the western legal system the individual precedes the group while in the African legal system the group precedes the individual. According to Ramose and on this basis Africa does not therefore have an

African law since its concept of law contradicts the notion of liberal western jurisprudence. Therefore, the upholding of African legal systems amounts to the negation of western laws.

Debates on the pre-existence of African jurisprudence and legal systems are not new and date back to Euro-modernity before the commencement of colonialism. In the United Kingdom, discussions on the existence and validity of African jurisprudence in the then Southern Rhodesia, now Zimbabwe for example, were ongoing as way back as 1919 (Ramose, 1999: 82). Writing in the *Essays in African Law with Special Reference to the Law of Ghana*, Antony Allott stated conceded that there is no denying both the existence and validity (to the subjects) of African jurisprudence noting:

Most competent scholars would not agree with their Lordship that there are any African societies in the first category (*of the humanitas*), of whom it can be said that their institutions are not to be reconciled with those of the civilised society (*the humanitas*), though there may well be particular institutions which we would find repugnant. No blanket rejection of any African legal system is therefore justifiable in the light of present knowledge (Ramose, 1999: 82).

Having conceded the existence of African jurisprudence and legal systems, the problem was how to reconcile them with their western jurisprudence. We argue that the subsequent demonisation, domination and banning of African jurisprudence emanated from the irreconcilable differences between the two. With western jurisprudence being centred on corrupt colonial individualism and African jurisprudence being group and ethically centred, there was no way in which the British Empire and other colonialists would have agreed to have the two jurisprudences coexist, hence the status of the later. In any case, such a group-ethics-oriented jurisprudence could have rendered the colonial project a difficult one as subduing and dominating communities with group-ethics-based rights is more difficult than corrupt individual rights based communities.

In arguing for the existence of an African jurisprudence, Allott rightly contended that in Africa there exists an Ubuntu based legal system known among the Basutho people as *mulao*. This institution

of *mulao* exists among many African civilisations such as the Shona where it is known as *murawo* and it refers to a body of applicable laws and tends to vary according to geography, tradition, customs and chieftaincy. *Murawo* in one chieftainship varies to *murawo* in the next, though there are many common laws, taboos, observations, practises and institutions. These may vary in their application depending on the area. An example is the mandatory one-day rest per week known in Shona as *chisi*. On this day, no manual work is to be done. However, the types of prohibited work vary from area to area so does the day of week when the mandatory rest is taken. Allott (quoted in Ramose) noted:

The need to particularise the type of specific *mulao* to specify a context, shows that there is no juristic thinking about the law in the abstract such as we find in a European school of law, but inly the recognition of different bodies of rules which may be invoked in different social and legal contexts (Ramose, 1999: 84).

African legal systems such as *murawo* for the Shona or *mulao* for the Basotho are very context specific, hence the Shona saying, *murawo wedunhu* meaning the laws and regulations applicable in a particular traditional jurisdiction. The difference between African jurisprudence and the western jurisprudence is therefore that while the former is based on Ubuntu and accords primacy to the ethical concrete, the later tends to emphasise the ethicless abstract. This emanates from the western jurisprudence's ambition to be privationally abstract and beyond ethics and morality while the particularistic nature of African jurisprudence accords it the ability to emphasise both abstract and the concrete ethics instead of emphasising the privational abstract over the concrete. In Africa, African laws are more popular than western laws in most communities as locals understand their *murawo* more than the codified western laws and byelaws which in most cases need the services of a qualified lawyer to act as the intermediary acting on behalf of their clients. The capitalistic nature of western laws notwithstanding, local laws emanate from the people while western

laws predominantly emanate from the (neo-)imperialism. This makes African jurisprudence organic, relevant, and cotemporary.

The positivity of African jurisprudence and laws also stand out when compared to their western counterpart. African legal systems are positive (Ramose, 1999: 85) in that they are framed in the positive, thus, '*You shall feed and shelter a stranger*' as opposed to, '*Thou shall not deny food and or shelter to a stranger*'. For Ramose, African jurisprudence does not create offences as criminal as does western jurisprudence, it rather and correctly directs how individuals and communities should treat each other. This is a huge difference because African jurisprudence is instructive, communicative and educative and not at the core belligerent, criminalising and confrontational. Ramose further notes that crime and deviance in the African context is addressed restoratively, i.e., to recreate an equilibrium and not to punish.

Lastly, because African jurisprudence balances the individual and the communal, it tends to be enforceable because individual members have an interest in the behaviour of other members of the group as their misbehaviour affects the rest of the group. A typical African case before a local chief is presented as *Family x versus Family y*. This differs from the western jurisprudence where cases are presented '*x versus the state*'. The victim, in this case, becomes a mere witness and in most cases, no compensation or restitution meant to restore equilibrium is paid to the victims. If any fines are paid, they are paid to the state and not to the victim.

In peroration, we will restate the case argued in this chapter, mainly that there is a need to rethink, re-present and reargue the case for an African jurisprudence. Such a jurisprudence existed before modernity and colonisation and was decimated by these twin evil forces. To date African jurisprudence, where it is recognised, is subservient to western jurisprudence. This amounts to human rights abuses of the highest order, i.e., subjecting a people to laws that are foreign while denying them the right to observe laws that are local. If Africans must demand transitional justice, it is definitely the right to rule themselves using their laws. In other words, the *anthropos* deserve the right to rights.

Conclusion

We have demonstrated in this chapter that according to liberal western episteme, not all persons, i.e., *Homo sapiens* are human beings as some are *humanitas* while others are *anthropos*. The term human therefore does not universally apply to all people and so does the notion of human rights. The *humanitas* and the *anthropos* are at different stages of their lives with the peoples of the formerly colonised world still fighting for the rights to their rights while those of the former colonisers are at a stage where they are fighting for what we can term e-rights. These include the rights to faster internet connectivity and the rights to cleaner and greener environments surrounded by a variety of fauna and flora constituting a diverse and balanced ecosystem. The plight of the Rohingya Moslems who are currently (December 2017) stateless and persecuted by Nobel Peace Prize winner Aung San Suu Kyi's Myanmar government serves as a case in point about the distinction between the *humanitas* and the *anthropos*.

The *kolossos* challenge facing the totality of the human race is therefore the ever-increasing gap in the lived conditions of the *humanitas* and the *anthropos*. The *anthropos* are ever becoming more thingified, marginalised, objectified and expendable. Movements such as Black Lives Matter and similar endeavours highlight this issue. On the contrary, the *humanitas* continue to live life to the fullest, enjoying everything from white privilege to the ill-gotten wealth from the various thefts from Africa and everything in between.

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Re-discoursing Jurisprudence for Africa in the 21st Century: Re-Centring Africa's Memory and Remembrance through African-authored Literary Arts

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Introduction

From the outset of the present discussion we make the admission that for technical purposes, Jurisprudence does not fall within our disciplinary purview. Yet, from the perspective of trans-disciplinarity, we see no legitimate reason that can stop us from making a contribution, using literature as a social science that explores and exposes areas where normally ‘angels fear to tread’— a preserve of the so-called ‘learned colleagues’. “Transdisciplinary Research is defined as research efforts conducted by investigators from different disciplines working jointly to create new conceptual, theoretical, methodological, and translational innovations that integrate and move beyond discipline-specific approaches to address a common problem” (Gimenez, 2017). Suffice it to contend that all laws begin with customs, morality and traditions, and collectively have a bearing on people’s conceptions of life, including fulfilment of reciprocal social relationships. This brings into play lore, mores, and governance of relationships in communities and society, governmental principles, knowledge orders, and general modes of living and thinking that storytellers and writers usually depict using their stories/art as memory and repository of traditions. The interface is therefore worth exploring.

We query/interrogate the ‘unconditional liberation’ of the formerly colonised Africans if they still un/wilfully subscribe to western jurisprudence that was carried over and transposed onto the post-independence states, as the basis of legality and legalism. Governing justice, human rights discourses, social organisation of inter-racial relationships, access to subsistence resources such as

water and land, morality and even spirituality, among other issues, Western Jurisprudence is still very much alive in Africa, Zimbabwe to be more specific. The latter reinforces economic exclusion and deprivation of the formerly culturally dominated majority as colonisation subtly lives on, continuing on the dehumanisation, oppression and over-exploitation path that the ruling elite judiciously execute as they observe the letter and spirit of “the law”. It means that “racism” as “the surest weapon” (Memmi, 1991: 75) for African social immobility and “foundation for the immutability of this life” (Memmi, 1991: 75) remains unperturbed. Values of civilisation, justice, human worth and paternalism remain predicated upon the culture of the former coloniser(s).

In arguing for restoration of a 21st Century Jurisprudence for Africa, I contend that frameworks drawn from African literary sources designed for Africans’ renaissance and self-regeneration be used to inform and guide policy and practice. Re-centring Africa’s Memory and Re-memory through African-authored Literary Arts as the basis of reconnecting with primary values and principles that have seen many communities survive the carnage of foreign domination thus becomes imperative. Memory and Re-memory as encapsulated in our orature and literary arts constitute an irreplaceable repository of our intangible cultural heritage. Among such critical literary works structured along African re-memory, re-membling and self-redefinition are *Sundiata: An Epic of Old Mali*, *Two Thousand Seasons*, *Things Fall Apart*, and *Anthills of the Savannah*, which works constitute the primary data for my arguments. The texts selected for the study are classical in the study of African Literature in that they have attracted world attention on African Literature as a discipline. The stretch and time limits set by the texts is also significant. That they are mainly male-authored testifies to the late entry of female writers as players in the African ‘modern’ literary productions that ascribe copyright to individuals and not the communities that originally generate the stories and philosophies (Kahari, 2009). Nevertheless, using self-ethnography as a child raised among the Shona peoples of Zimbabwe, women have always played a critical role in socialising children using oral folklore. To claim that they have made little or no contribution in the production and propagation of orature would be

falsifying existential realities. Niane's *Sundiata: An Epic of Old Mali* also testifies to the same.

The arguments in the present chapter proceed on the premise that to talk about 'jurisprudence' is to talk about any society's philosophy of life, value systems, beliefs, practices, privileges, rights, duties and social responsibilities as encapsulated, embedded and embodied in that particular society's language and other cultural symbols. It is through the latter symbolic representations that actions, behaviours, attitudes and their outcomes are weighed, and either rewarded or punished. Cumulatively, the symbolic representations reflect on morality, shared belief systems and values, as well as aspirations and visions of that particular society. The African perceptions of law, social accountability, morality and shared belief systems in this chapter draw from orature/literary works that have their bases in indigenous African philosophy, experiences, traditions and expressions of "group pride" (Mbeki, 2009: 110) and consciousness. To this end, talking about African traditions, knowledge and belief systems and practices without reverting to discourses on rights of indigenous people and the right to cultural identity as embedded in their local languages would be cheating and short-changing audiences and readers. The local languages and their philosophies signify unique cultural identities, worldviews and philosophies of life, aspects that are critical towards understanding any such peoples' jurisprudence. The sum total of the foregoing conglomeration constitutes the people's soul or the core of their very being and humanity. These intangible aspects constitute an inviolable human right, right to being, and are irreplaceable.

For the purposes of our discussion on how central cultural identities are to any practise of law and or legal system, the very use of the word 'jurisprudence' points to subtle masking. The net effect of such distilled rules, cautions and measures adopted to either reinforce or discourage certain types of behaviours creates checks and balances for sustainable social cohesion. In addition, these checks and balances must be socio-culturally based. This explains why we argue that laypersons and non-practitioners divorced from the western cultures that inform their legal systems, are hoodwinked and or cheated from understanding the worldviews and philosophies

undergirding the practice. Neither would they understand the bases upon which liberties, responsibilities, duties and errant behaviours could be measured, appreciated, weighted and judged. For example, how can this be helpful to the Zimbabwean common person? If it is the binoculars and campus that informs social conduct, how can one navigate and apply the Zimbabwean Jurisprudence that is based on Roman and Dutch Law?

We are neither Roman nor Dutch, nor are we conversant in Roman and Dutch classics and traditions. Neither were there any consultations or referendum, but foreign impositions. What we have then, is deliberate exclusions, masking, trickery and treachery since certain groups of people are privileged at the expense of others. There are certain concepts and aspects about philosophy that are neither culturally nor linguistically transferable. “Indigenous peoples are recognised by certain characteristics – but these are only the tip of the iceberg. Deeper knowledge is embedded in the culture” (Lotte Hughes, 2003: 50). Steeped in alien cultures, traditions and values, Zimbabwean jurisprudence renders the majority of citizens perpetual outsiders marooned outside the norms and values undergirding these legal sciences/jurisprudence as practised in our country and continent. Mazrui (2002:71) rightly observes that “[i]n most African countries, independence meant the transfer of power from the West to the westernised...those with a good command of the imperial language and a substantial imitation of the Western life-style”. These become the opinion leaders in their countries. No wonder we are complicit in our own dispossession, dehumanisation and annihilation. The tragedy is that we are willing mental slaves without admitting to the practical implications of the courses of action and systems of governance that we uphold. The legacy we pass on to posterity, then, is a legacy of imitators, who are neither conversant with the cultures of the West, nor with their own indigenous philosophies.

Generally, people end up with distorted ways of seeing, knowing and understanding, internalising imitations that demean their identities, historical experiences and value systems. This is why the same jurisprudence boasts that ignorance is not an excuse, explaining why the western legal systems have remained powerful game-

changers locally and internationally, to Africa's disadvantage and peril. Indirectly, such an approach strips the would-be beneficiaries of any right to fair protection and social justice. It also subtly deprives them of the right and privilege to contribute to values that should help them frame and navigate their lives. By implication, non-repeal means that we continue "looking at ourselves through the eyes of others, and measuring our souls by the tape of a world that looks on in amused contempt and pity" (Mbeki, 2009: 110 citing Du Bois' *Souls of Black Folks*). The struggle for liberation therefore does not end with political flag independence. That is subject for another paper, another day.

The easiest way to annihilate a people and their posterity is to erode away the spiritual and intangible cultural attributes that constitute their soul and sensitive point of shared existence. A soulless people can never take responsibility for their destinies and sustainable futures. Thus, driving programmes and projects that deny the articulation and centralisation of a people's intangible cultural heritage is genocidal as such projects in the final analysis create zombies, automatons and robots that are guided by targets/numerical outputs, and never people-driven values, belief systems and life-sustenance for all. Any efforts to bring sustainable scientific development must therefore be conducted within the frameworks of the generally shared and common values that safeguard and promote greater social accountability, responsibility, and transparency in the interest of sustainable futures for all in a peaceful and conducive universe. The latter aspects can only be achieved holistically once Africa's memory and soul as embedded in literary discourses and orature are reinstated to occupy their critical place as irreplaceable aspects of intangible cultural heritage that must undergird, guide and drive an education beneficial to Africa. The universe that memory and re-memory generates, nurtures and safeguards is the binoculars and barometers that must be used to reinstate that which Africa continues losing through wholesale embrace of foreign-designed education programmes, including western jurisprudence, as has been the sad case till now. We therefore argue that by driving a soulless Science-Technology-Mathematics (STEM) education programme as is the case with the Zimbabwean

New Millennium Primary and Secondary School Education Curricula, as well as the commercialisation of tertiary education that has become the major thrust, the policy-makers and society at large are committing genocide, one of the worst crimes against humanity.

Background: Africa the ‘Dark’ Continent?

How can someone be not a problem if they are always happy to be governed by other people’s laws and values? It renders them infantile and makes them perpetual subjects/minors. They are not part to the system that formulates the laws that govern them. One is a junior for as long as they are willing to subscribe to legal systems and frameworks orchestrated elsewhere. Not only that, but also always willing to bend back double and make amendments to their own frameworks in order to be acceptable to the alien communities dictating the paces at the expense of the incumbents’ own identities, heritage and destinies as a people. It renders them answerable to those who generate the same laws of governance, enslaved psycho-intellectually.

Further, they become appendages to perpetuity, speaking to dominant principles and obligations that must be upheld/observed. The minors in the equation have a price to pay. Intricate internal features to their existential realities such as age, cultural context, religious/spiritual motivations, gender roles and responsibilities, social structures and safety networks, among others, that must form the basis of arguments and judgments, may be missed and therefore may not always be considered. “The potentially harsh effect” (Phelps, 2011: 153), as has been the case on matters of subsistence, land-ownership and survival in Zimbabwe as an example, makes foreign crafted legal philosophies, their nomenclature and body of knowledge, undesirable.

In the Shona concept of justice, for an example, the desired end is ‘justice for peace’, which ensures that people receive fair trial and pay reparations so that they can continue to live peaceably in the same communities. This contradicts Western jurisprudence that emphasises that a crime is not against the individual, but against the state, meaning that the wronged parties remain aggrieved and

antagonistic towards the perpetrators of sacrilege/crime/transgression. This explains the fermenting violence and embittered relationships emanating from unresolved grievances that would have been addressed using Western Jurisprudence in an African cultural setting. As a result of unresolved conflicts, tensions and violence abound from generation to generation with disastrous social and ecological results because we “have either refused to think at all or filled our minds with the wrong thoughts which give birth to wrongful actions” (Africa, 2011:13). Western jurisprudence has thus perpetuated social disharmony and miscarriage of justice with impunity while we aid them in the process (Zimbabwean Chief Justice Gubbie’s address at a UZ-hosted Conference on Africa’s Intangible Heritage, 2016).

Contrary to harmonising relations in communities and society, Western Jurisprudence perpetuates western social control and hegemony, gratifying the interests of those who are formulating the laws. This is how the trick of the language that packages the theories come into play—embedded beliefs, meaning of experiences and how they can be reported (Appiah, 1992: 119), implying that language by nature is philosophically theory-laden, influencing perceptions. Rationality and reasonableness are thus prejudged using language that is naturally an encapsulation of society’s beliefs, experiences and philosophy of life, further influencing epistemology and procedures. In this regard, continual clinging onto alien languages, as is the case with Zimbabwean Jurisprudence in Law Schools, administration and the Courts, nurtures social Darwinism that depicts the ‘native’ as “half devil” and “half child” (Rudyard Kipling’s poem: “The White Man’s Burden” in *Gunga Din and Other Favourite Poems*). Claims of a ‘world culture’ championed through the English Language that some schools of thought claim to be ‘humanising communication’ across civilisations (Mazrui, 2002: 52) is a veneer of domination that captures “the underprivileged races and cultures” (Mazrui, 2002: 47-48).

The un/willingness to identify with the coloniser, to be assimilated and acculturated could also subtly speak to evidence of un/principled approaches to definable and identifiable philosophies. In this regard, the nomenclature of Africa as a ‘dark’ continent comes

as no surprise, given the lenses used to judge and assess the intellectual maturity and dependence of the African intelligentsia in particular. Impliedly, there is therefore no inherent conflict with the judicial systems that are coming into contact, the systems that Africa and Africans willingly imbibe and execute against themselves and their own people. That Africans are willing to modify their own systems in order to be accepted and accommodated by alien legal systems, testifies to this inferior status they un/willingly embrace.

Africans imbibe self-hatred and model themselves into the images desired by those ‘naming’ them, turning them into their in/voluntary possessions. Expressions like “we did come away with a better understanding of *our Africans*” (Godwin and Hancock, 1993: 48) show Africans as non-autonomous beings. The obtaining practicality, nullifies any original forms of governance, using prescriptions that may not necessarily be in tandem with our African-ness and experiences. Further, giving pre-eminence to other cultures and civilisations other than your own implies admission into a second or lower class of the humankind family. The latter claim does not in any way discourage borrowing from other cultures, what is critical is borrowing intelligently, not wholesale to a point of submerging one’s own cultural identity and civilisation. The world today accords no space to the “weak, lazy and ignorant” (Africa, 2011: 229).

The infamous cliché by Ian Douglass Smith, former Prime Minister of Rhodesia, against African Nationalist politics in Rhodesia (Zimbabwe): “Not in a thousand years” will Africans be ever in a position to self-rule or take over the reins of power, metaphorically refers to intellectual capacity, particularly expertise to overhaul the principles and systems of governance. This is an intellectual warfare we are talking about, making ours “the unsettled land” (Alexander, 2006) at the level of ideology and philosophies that drive the systems. The carnage on the “image and mind control” (Clarke, 1991: 329) of the African progeny by the colonial legacy is still to be quantified. We are famous rhetoricians alone. Godwin and Hancock’s conclusions are instructive: “Rhodesians never die” (1993), a motif borrowed from Tholet and Dillon’s song of the same title—“And this mighty land will prosper// For Rhodesians never die” (Godwin and Hancock, 1993: vi). The colonial system institutionalised

discrimination and exploitation, which we have further reinforced after attaining political independence. In addition, across the whole African continent, despite political independence, we are yet to learn of an overhaul of governance systems and structures to effect and reflect what we know, cherish, desire and accept about ourselves as Africans, Constitutional Referendums notwithstanding.

“What we do for ourselves// depends on what we know // of ourselves and what// we accept about ourselves” (Timothy Callender, cited by Clarke, 1991: 329). Ironically, how far we can go into our future and how sustainable that future can be is partly determined by how far back we can remember. Balancing individual, family, community, society and national self-interests vis-à-vis international expectations largely gravitate around how much we are willing to bring to the rendezvous of knowledge (Cesiare, 1995) as an African people. It is imperative that we consciously choose never to remain parasites that author their own intellectual deaths by refusing to wean themselves off the cancerous colonial breast, and embrace self-enriching philosophies grounded in and undergirded by centuries of distilled wisdom gleaned from ancestral philosophies, traditions and experiences embedded in our own indigenous languages that are the incontestable repositories/granaries of our experiences trans-generationally. Only then, can we truly justify our rebuttal of Joseph Conrad’s euphemism: “heart of darkness”.

Further, as long as we are not really sure which and whose philosophy we must use in our daily endeavours to govern, liberate, emancipate and empower ourselves, we remain objects of mockery and buffoonery. The Zimbabwean post-2000 land reform processes and indigenisation laws that earned the country international controversy are cases in point. “Policy was regularly made and unmade” (Alexander, 2006: 189). The point is not how successful we have been. But making a difference in our own self-interest, never giving up on ourselves despite the odds, but to keep trying reinventing ourselves. Whose philosophy orders and determines our endeavours and behaviours in society and our relationships with others and the different environments partially defines/explains who we truly are. The policies of assimilation and acculturation through indirect rule have remained intact, if not stronger in the neo-colonial

period: “The policy of assimilation held out a carrot to all Africans (in French colonies) of potentially becoming French citizens. ... it asserted that Africans only became civilised by adopting French culture” (Moseley, 2009: 67). The British system of indirect rule and the strong influence through the education system left similarly strong prejudices that have left British rule subtly present through the exploitative and exclusionary governance policies religiously adhered to by the ruling elites. Hoodwinked thus, could there be any prospects that the ‘dark’ continent can possibly reinvent, reinvigorate, recreate and redeem herself from the present quagmire ideologically, intellectually and philosophically when it is the “Frenchified indigenous population” (Womesely, 2009: 58) and others of a similar grain holding the reins of political power in the post-independence era?

Nevertheless, the fact that the colonising agents refused and continue to refuse recognising the original indigenous social control mechanisms, does not nullify their existence. Just as Niane (1958) argues, in *Sundiata: An Epic of Old Mali*, the fact that much of Africa’s history was not written, but orally passed down trans-generationally, does not mean that Africa had/has no history. Similarly, that there could be no written jurisprudence references in the African indigenous languages, does not translate to African indigenous communities operating haphazardly on autopilot without any traceable frameworks. The richness of “*Vakuru vanoti*” or “*Vakuru vaiti*” (Experiential ancestral wisdom says) demonstrates active minds with a legacy that has been collectively sustained across the ages. This admission takes us into closer appreciation of the memory and re-memory of African mechanism of social monitoring and control, justice for peace, transparency, and social accountability as shown in the literary depictions that follow. The whole process of self-naming, self-describing and self-explaining, empowers and liberates the incumbents. Thus, reinforcing the centrality of African memory and re-memory in the African literary arts and orature in conscious strides towards refashioning and effecting Jurisprudence for Africa by Africans using African philosophies for sustainable peace on the African continent in the 21st Century.

Memory, Re-memory and African Jurisprudence from *Sundiata: An Epic of Old Mali* to *Anthills of the Savannah* and beyond

Using snippets from the selected literary texts as our window into the clock and repository of African history, culture, traditions of governance, justice, peace, conflict resolution and collective social accountability, we hope and argue that the same education systems that have been the most potent cultural weapon of mass destruction in our communities, is the same weapon that we can repossess and influence to resuscitate the African soul. Our own stories, stories about the African experience are repositories that can be mined for self-regeneration, hence the selection of *Sundiata: An Epic of Old Mali*, *Things Fall Apart*, *Two Thousand Seasons* and *Anthills of the Savannah* for our discussion on Africa's and Africans' memory and re-memory. Brought together, these four texts constitute the clock that tells our political and cultural time of day (Chivaura, 2016: 2), in addition to also telling us as a people "where [we] still must go and what [we] still must be" (Chivaura, 2016: 2).

Things Fall Apart and *Sundiata: An Epic of Old Mali* testify that Africa was not one long night of savagery awoken from a deep slumber by white missionary civilising mission. The narratives testify to the contrary. The celebrated opening paragraph of *Things Fall Apart* evinces a world resonating with values, systems, beliefs and practices that galvanised society into an orderly and invincible unity thriving on a shared ethos that defined and governed relationships:

Okonkwo was well known throughout the nine villages and even beyond. His fame rested on solid personal achievements. As a young man of eighteen he has brought honour to his village by throwing Amalinze the Cat. Amalinze was the great wrestler who for seven years was unbeaten, from Umuofia to Mbaino. He was called the Cat because his back would never touch the earth (*Things Fall Apart*, p. 3)

Achebe's is a reminder about an oiled Igbo aesthetic system commonly shared across all the villages and beyond. In as much as the world of aesthetics and art thrives, monitored by a cherished

organic self-governance approach, the socio-cultural similarly does the same as depicted through Okonkwo's 'solid personal achievements' that society recognises and exhorts. In the Igbo world that the narrative projects, achievement, greatness and fame are based on traceable yardsticks. For Okonkwo, wrestling and bursting yam barns at the end of farming seasons enable him to feed his family of three wives and children unlike his father Unoka.

However, fame is not a licence for Okonkwo to commit sacrilege among his kinsmen. On another occasion, he is punished by the village elders for breaking the Week of Peace when he beats his junior wife for failing to give him a meal at the appointed time. No one is above reproach and there are no extenuating circumstances. Excesses are taboo and therefore punishable. In yet another different occasion, Okonkwo is given charge by the village elders to look after Ikemefuna, a boy paid as a ransom for peace after his father had accidentally killed a woman from Umuofia. From an Igbo cultural philosophy, Okonkwo becomes Ikemefuna's father such that when the oracle of Umuofia eventually pronounces that the boy be killed, Okonkwo was not supposed to lay his hand against Ikemefuna. Ezeudu, the oldest man of the village, warns him not to commit such sacrilege, but he disregards the advice. Fatherhood is more socially oriented than biological. The murder of Ikemefuna haunts him.

During a gun-salute at Ezeudu's funeral, Okonkwo's gun accidentally explodes and kills Ezeudu's sixteen-year-old son. Igbo custom and tradition, transparent as it was, needed no interpreter or seer for Okonkwo and his household to know the judgement and aftermath:

The only course open to Okonkwo was to flee from the clan. It was a crime against the earth goddess to kill a clansman, and a man who committed it must flee from the land. The crime was of two kinds, male and female. Okonkwo had committed the female, because it had been inadvertent. He could return to the clan after seven years (*Things Fall Apart*, p. 91).

Okonkwo's compound is demolished to *cleanse* the land. The metaphysical logic is quite normal in African thinking. Though

inadvertently caused, morality, punishment and restitution cannot be traded (Mbiti, 1970: 210-215). “The list of what should and should not be done is so long and detailed that a person is constantly confronted with moral demands throughout his life. This is seriously so in the environment where the individual is conscious of himself in terms of ‘I am because we are, and since we are, therefore I am’” (Mbiti, 1970: 214). Rather than having laws and principles inscribed in books, hidden from the public eye, African Jurisprudence in this regard is inscribed on the tablet of the heart (Rukuni, 2007; Feris and Moitui, 2011), mind and conscience, shepherding the individual at every turn.

Without anyone’s bidding, Okonkwo flees with his family to Mbanta, his Mother’s homeland, for exile. Okonkwo’s Uncle Uchendu explains why Mbanta offers Okonkwo refuge:

Nneka, or Mother is Supreme...A man belongs to his fatherland when things are good and life is sweet. But when there is sorrow and bitterness he finds refuge in his motherland. Your mother is there to protect you... (*Things Fall Apart*, p.98)

The inescapable cultural need to keep balance between the genders is desirable. For all we know, the law of the jungle where the fittest only rule the roost has no place in preserving peace, respect for human worth and cohesion. Achebe (1990: 45) argues thus: “The writer cannot expect to be excused from the task of re-education and regeneration that must be done”.

*‘For whom is it well, for whom is it well?
There is no one for whom it is well’* (*Things Fall Apart*, p.99)

The inextricable nature of both punishment and rehabilitation cannot be missed, and everyone in the community and family must consciously discharge their responsibility to the very end as opposed to faceless and nameless wardens, steel fences/walls and mechanical systems, probably explaining why crime keeps soaring despite the so-called modern approaches to justice, in which case justice becomes an exercise of futility. In his motherland in Mbanta, Okonkwo is

given space, time, land to work in order to earn a living for himself and his family, and relations to help him heal. He carries his responsibilities with him wherever he finds himself: 'Man the unfree' because of his bundle of duties (Chivaura, 2016), keeping his consciousness and soul as a social being alive — "their reference point to the past and their antennae to the future" (Maathai, 2010: 160), the sense of the world around them. Jurisprudence is therefore physical, material and spiritual, steeped in the cultural norms, beliefs, demands, values and expectations, for society's greater good. The corollary is that to pretend and insist that Western Jurisprudence and its execution in former colonies is nothing but letters of the law is self-tom-foolery of the highest order.

The cultural reality that Achebe gives in his narrative "already gives a measure of the strengths and weaknesses of the people" (Cabral, 1979: 151), a critical attribute for holism and self-introspection on matters that give sustenance, fairness, transparency and stability to society. During his second year in exile, Obierika brings Okonkwo two bagfuls of cowries from debtors back home in Umuofia. We note some critical attributes about Igbo jurisprudence from Okonkwo's experiences. Crime can never be condoned. Justice is also not an end itself. It is meant to rehabilitate and never to destroy offenders, hence the courage offenders should have throughout their period of rehabilitation, for *'There is no one for whom it is well'*. Time itself is also spiritual and can therefore not be squandered, explaining why life's responsibilities and duties must be honoured even during times of rehabilitation of the offender. The ultimate end of justice is achieving balance, peace, and fairness. It also ensures material, social, ideological and spiritual control.

Experience and practice of Western Jurisprudence speaks to similar objectives of control, but for a clique of beneficiaries whose lives feel threatened thriving on imperialistic agendas. Okonkwo could have been thrown into total isolation in prison for the offences, or even sentenced to death for murder, in the case of Ikemefuna, or culpable homicide in the second tragedy, despite the socio-cultural nuances and pervading spiritual circumstances. Yet, it is arguable whether any rehabilitation takes place in total social isolation/seclusion. The soul can only remain alive among other

human beings, which is the essence of justice within the African set-up. Reprimanding is not equivalent to wielding an axe to terminate another life as a means of vengeance or retribution. Reprimanding always focuses on possibilities of regeneration and renewal, which is the original depiction we have in Okonkwo. Nevertheless, the Oracle's pronouncement of Ikemefuna's death alludes to the ever present influence of the spiritual world alluded to elsewhere. The mundane and the spiritual are intertwined. Similarly, African jurisprudence is spiritually ingrained. Ikemefuna would always have been a strange spirit among the people of Umuofia. As a ransom token, he would also have no ancestral ties of any sort. Further, rights and privileges are also relational and reciprocal as espoused in the duties and responsibilities that kinsmen carry and discharge.

The socio-cultural and political spectrum that Achebe depicts is indubitable. We thus borrow Bandele's exhortation about how our own stories as memory can actually help to catapult our agenda for self-emancipation and achieving sustainable cohesion and peace:

Freedom and its boat had arrived. And out of the freedom boat, almost imperceptible, just behind – some would say hand in hand with freedom itself, was memory, the vengeful, unforgiving brigand of all time. 'It is the storyteller,' Achebe has said, 'who makes us what we are, who creates history. The storyteller creates the memory that the survivors must have – otherwise their surviving would have no meaning.' Memory heals, it generates. It is an affirming god, a transcendent guide in the ritual of continuity. But when spurned, when repressed, memory mutates into a trickster imp and seduces the wayfarer to the precipice and beyond (Bandele, 2001, "Introduction: *Things Fall Apart*: x).

Sundiata: An Epic of Old Mali gives more insights into the indispensable nature of intangible cultural heritage as anchor to fair, transparent, just and sustainable social governance. No role is too small/ or too unimportant. Neither is there any role that could be too big to afford other members of society the right to bulldoze their way or to bully others with impunity. Niane's *Sundiata: An Epic of Old Mali* answers to many questions regarding orature as institutional

memory, jurisprudence, aesthetics, ideology, function-laden and communal symbol. Niane explores all these using the function of the griot — “man of the spoken word” (*Sundiata*, p.63) “who does not know what lying is” (*Sundiata*, p.1). Niane opines:

Formerly ‘griots’ were the counsellors of kings, they conserved the constitutions of kingdoms by memory work alone; each princely family had its griot appointed to preserve tradition;...the griot appears as one of the most important of this society, because it is he who, for want of archives, records the customs, traditions and governmental principles of kings (*Sundiata*, p. vii).

Traditionally griots “are depositories of the knowledge of the past” (*Sundiata*, p.41); “are the repositories which harbour secrets many centuries old... are the memory of mankind... bring to life the deeds and exploits of kings for younger generations” (*Sundiata*, p.1). Oral transmission of the past as memory in the African traditional sense establishes and justifies legitimacy. Further, whoever “knows the history of a country can read its future” (*Sundiata*, p.41) and this is how legacies are made and safeguarded, including the morality and laws that should guide and safeguard relationships.

Memory symbolically encapsulates the antennae to oracles (centre of spirituality) of the past, benchmark of present conduct, morality and relationships (yardstick and inspiration), as well as the binoculars into the future (vision) (Maathai, 2010; Linde, 2009). “It is the griot who rescues the memories of kings from oblivion, as men have short memories” (*Sundiata*, p.41). Niane shows that kingship was spiritual and rooted in the people’s traditions. For this reason, unless by force, kings also could not clandestinely get into Office without grounding in their ways and traditions: “Griots know the history of kings and kingdoms and that is why they are the best counsellors of kings” (*Sundiata*, p.40), “the result of a long tradition. For generations ...passed on from father to son...passed on...without alteration...deliver[red] without alteration... free from all untruth” (*Sundiata*, p.41). Insistence for none alteration explains the consistency and dependability of the governance principles trans-generationally. Kings like Sundiata are trained in the mores, lore,

history and traditions of their kingdom from childhood by entrusted griots. This is how foundations of kingdoms and ideological philosophies ensured the cementing of the subjects through sharing a common vision. Nothing similar can be said about the governance systems in the modern day African states. It is ironic that while Western Jurisprudence is recorded in writing for cross-referencing, “this invention has killed the faculty of memory” and “writing lacks the warmth of the human voice” (*Sundiata*, p.41) and human heart. “What paltry learning is that which is congealed in dumb books!” (*Sundiata*, p.41).

The trappings of the written word need interrogation, reflection and introspection for our Jurisprudence to answer to the call and yearnings of the true spirit of Africa and her progeny. The comparison between the oral word of the griots and the prophets is also instructive. The griot compares the life-histories of the magnanimous Maghan Sundiata, king of the Kingdom of Mali and that of the arrogant and despotic Soumaoro of Sosso to demonstrate that power lies in good deeds to be worthy of ancestors (*Sundiata*, p.63). The need to inject memory and re-memory in governance systems needs no begging if our Jurisprudence is to embrace and reflect the true African heritage. History as memory and re-memory is forever present to influence choices, direction, governance, morality and future action, never locked away in some secret inaccessible chambers. This is how the Mali kingdoms and their civilisations have reinvented themselves for greater and more sustainable development as evidenced by Sundiata’s epic. More importantly is the realisation that “there is no room for two kings around the same calabash of rice” (*Sundiata*, p.62) and that kingdoms grow and disappear like their leaders. Similarly, no two civilisations can share the same roost. The question is whose philosophy/morality undergirds our governance systems in post-independence Africa, and why, hence the question that we are seized with in the present discussion.

The success of Sundiata’s Kingdom does not entirely depend on him alone as ruler. He gets the jinn/oracle (*Sundiata*, p.45) and the people’s mandate to save Mali from the incestuous and avaricious Soumaoro. “Man has a bundle of duties which are expected from him

by society, as well as a bundle of rights and privileges that society owes him. It is by such complex terms that a person is defined and identified. They order and determine human behaviour in society” (Chivaura, 2016: 2), and are engraved on the heart and psyche. The skills and talents of every wo/man are also acknowledged. The kingdoms rally together to fight a despot. At the end of their travails, Sundiata gave back the kingdoms to their rightful rulers one by one. The warrior, merchant, musician, griot/historian, blacksmith, farmer, hunter and every citizen come together to celebrate Sundiata’s defeat of the “insolent rogue” Soumaoro (*Sundiata*, p. 74). That “Sundiata pronounced all the prohibitions which still obtain in relations between the tribes” (*Sundiata*, p.78), to each assigning land, establishing the rights of the people and ratifying their friendships, testifies of a thriving Malian Jurisprudence. The epic also opens up and exposes a rich cultural aesthetic behind the morality governing Sundiata’s Old Kingdom of Mali: “When the seed germinates growth is not always easy; great trees grow slowly but they plunge their roots deep into the ground” (*Sundiata*, p. 17), alluding to desirability for cultural rootedness, patience and distilled wisdom anchored on God’s and ancestors’ mysteries. Justice in *Sundiata*’s Mali tradition, is also by consensus made to protect and serve the weak, vulnerable and innocent:

Sundiata made a sign indicating that the griot had spoken well, but he added, “I defend the weak, I defend the innocent... You have suffered an injustice so I will render you justice, but I have my lieutenants about me and I would like to know their opinions...

Justice had to be granted to the man who came to implore justice (*Sundiata*, p. 61).

May there nevermore be falsehood... (*Sundiata*, p. 77).

He left his mark on Mali for all time and his taboos still guide men in their conduct (*Sundiata*, p.83).

Sundiata’s socio-cultural and people-centred philosophies of governance take our discussion to re-memory and re-memembering African mysteries of survival that Ayi Kwei Armah depicts as key to Africa’s sustainable future, which narrative constitutes the core of

Two Thousand Seasons. The aesthetic value of African Literature itself can also neither be missed nor downplayed.

A snippet from *Two Thousand Seasons* using the character of the stooge and self-interested king Koranche who works in complicit with white killers/destroyers from the sea and predators from the desert, depicts how a soulless governance motivated by self-aggrandisement that is self-destructive. It is also anathema to Africa's continued survival, particularly after the tragedies of slavery and colonialism. The liberation of the African people cannot come from alien power or alien jurisprudence. The alien's jurisprudence is bent on one key aspect: "our own people's immobilisation" (*Two Thousand Seasons*, p.171) with the aid of unthinking "kings, chiefs and princes and leaders and assorted parasites there thirsting for the white destroyers' drink in their *unthinking bellies* and for the white *destroyers' trinkets*" (*Two Thousand Seasons*, p.175). Consumerism seers the leaders' capacity of judgement, resulting in the treacherous "sale of their own people to waiting predators, waiting destroyers" (Ibid). Alien ideologies are anti-life in the final analysis despite the seemingly hanging pickings in the short term—detachment from the 'source' sound the death-knell of the so-called recipients, reinforcing the power of the proponents.

Quintessentially, lived experiences have unwaveringly shown that no two civilisations can thrive side by side in the same roost, one has to give way, thereby calling for interrogation of relevance and practicability within the local set-up—"criticism before solidarity, and vigilance ahead of assent" (Said, 1994, *Culture Imperialism*, p.63). Key to the discourses of jurisprudence are the issues of power, hegemony peddled softly as 'development', 'advancement', 'universalism' and at times 'globalisation', without having the cultural centre disclosed before assent, intelligent borrowing notwithstanding. Embracing Western Jurisprudence wholesale as has been the case in former colonies speaks one fate: cultural domination, oppression, suppression and annihilation. "We are not a people of yesterday... But the haze of this fouled world exists to wipe out knowledge of our way, the way. These mists are here to keep us lost, the destroyers' easy prey" (*Two Thousand Seasons*, p. 1). "Their road flies off opposite reciprocity" (Ibid: 40), which is the way. The

lubricants of their law philosophy comprise of “force”, “fraud they call intelligence”, “use of violence”, “practice of robbery, cheating, at best a smiling dishonesty”, “they plant nothing. They know but one harvest: rape” (Ibid) and therefore incoherent and barren. The clarion call is therefore self-preservation first.

Conclusion

We conclude our discussion with *Anthills of the Savannah* whereby we witness the destructive effect of President Sam’s egocentrism in the post-independent Westernised Western African Kangan State. When all scruples are thrown out of the window, trouble brews. The President, who comes into power through a coup, is deposed by a coup. Deification of the President as the one centre of power destroys the once promising new ‘democracy’. Using ties from school and childhood, the President appoints a ruling elite clique that surrounds him, skills-competencies or lack thereof notwithstanding. Like Achebe’s *A Man of the People*, the electorate is manipulated politically for development and AID by the President and his cronies. Provinces like Abazon are turned pariah for their refusal to support Sam’s campaign for the title President for Life. The gaze on post-independent stinking rot tells of a morally defunct and spiritually depraved governance system. Litany of atrocities are committed by a morally numbed mind. The novel ends with a coup culminating from a largely self-aggrandising soulless, headless, heedless, senseless and directionless system, borrowing from philosophies embedded in the languages of the former colonisers.

Finally, if jurisprudence is philosophy of law, can the language of the coloniser aptly and adequately express the African anguish of dispossession (Gomo, 2010; Kincaid, 2000), exploitation, manipulation, dehumanisation, rape and enslavement, and interpret with precision and clarity the desires of the Africans, and answer to the calls for litigation, equity, reparations, respect and social justice without causing further damage? Have the necessary adjustments been made to stem the disfigurement, dispossession, dismemberment and intellectual holocaust caused by the legacy of colonialism?: "We started by changing the country we took from you

to a country that you will find, many centuries later, when you gain political power. It would be totally unlike the country your ancestors lived in; it would be a new country” (Bopela, 2017). The question centuries later is: Where do we go from here? Using which lenses? To what end?

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The Environment, Mining and Western Interventionisms: Towards a Pan-Africanist Jurisprudential Model of Justice in Africa

Felichesmi S. Lyakurwa

Introduction

Over the past several decades, Pan-Africanism has provided a concrete platform whereby different theories about justice, ethics and morality for the Africans, including for those in the diaspora, have been grounded (Richardson, 1993). The Pan-African unity promises to offer a common interest towards enforcement of Ubuntu-informed civil and human rights including self-determination and sovereignty that would end Euro-American (neo-)colonial domination in Africa. It is interesting then to examine recent trajectories of Pan-Africanism, in terms of restoration and equity sharing of natural resources among the African communities particularly the rural impoverished. Pan-Africanism can provide the foundations for setting up supportive legal structures and various forms of African transnational economic coordination amongst the Pan-Africanists, including the African diaspora. On the other hand, Eurocentric agreements including African Growth and Opportunity Act (AGOA), North American Free Trade Agreement (NAFTA) and General Agreement on Tariffs and Trade (GATT) pose unique challenges to conceptions and practices of Pan-Africanism (Pauly, 1995). The challenge is that such Eurocentric agreements and extrajurisdictional interventionisms weaken Africans' control and ownership over their resources.

Apart from creating insecurities, for Africans (Brown, 2006), the agreements and interventionisms result in disinheritance of Africans who lose ownership and control over their resources including land and minerals. A more realistic Pan-Africanism therefore, should recognise Ubuntu-inspired shared interests in promoting social-

economic justice for the entire African populace. Hence, while Pan-Africanism remains a viable ideology, its adherents must create relevant dialogue and form new Pan-African alliances to mitigate the potentially harmful effects of foreign dispossession of Africans, reduce foreign control over African resources, reduce foreign exploitation of Africans. Moreover, importantly, these Pan-African alliances must look beyond national considerations and embrace a theory of Pan-Africanism that enhances restoration and equity in the sharing of benefits generated from Pan-Africanist control, ownership and “investments” in African resources including mining, agriculture and manufacturing.

After the 1980s, many countries in Africa including Tanzania initiated policy reforms, which opened doors to Euro-American foreign “investors” in the mining and other sectors. This era has been marked with an increase in minerals production and its share in the global minerals production increased significantly. Despite the increased productivity, the mining sectors have performed poorly in terms of the countries’ environmental and social-economic developments. For example, Weber-Fahr (2002) revealed that countries whose minerals constitute a major share of exports, the per capita GDP growth in the 1990s was either negative or minute. In addition, African communities’ expectations about equal sharing of the benefits accrued from the mining industry have remained a dream. The situation therefore, could spur conflicts, and agitation by social movements in the African mining sectors. The assumption that neoliberalism raises extraction and productivity of African minerals does not translate to improvements in the lives of Africans. Transnational corporations do not really come to Africa to invest but they come to loot resources and exploit African people. Although the transnational corporations are commonly and deceptively addressed as “investors”, African states and governments need to remember that their real reason for coming to Africa is to loot resources and to exploit Africans paying as little as possible, to African states, while repatriating as much as possible, including to tax havens.

Inclusive business models have been postulated for mining industries in Africa, including in the provincial government of Katanga in the Democratic Republic of Congo, as part of the

corporate social responsibilities (CSR). The corporate social responsibility is meant to support the African impoverished to enter the supply chain as clients, customers or producers and business owners (Virah-Sawmy, 2015). However, the extent to which the models have been applied in Africa is not clear. Pan-Africanist models of justice need to be crafted with a view to furthering not merely environmental justice but also justice to the (neo-)colonially dispossessed Africans. In this regard, a comprehensive review on implementation of Pan-Africanist inclusive business models in Africa to ensure restoration to Africans is important. Considering the effects of minerals extraction and processing including disturbed land, water and air, crafting and implementing the Pan-African justice for the communities living in/around mining areas is also important. In the light of (neo-)colonial histories of dispossession and exploitation of Africans, it is necessary to ensure that these (neo-)colonial crimes against Africans are made good first. In place of Eurocentric attempts to circumvent restoration of ownership of property and resources to Africans, I argue herein that it is not necessary from a Pan-African jurisprudential point of view to foreground ecocentrism, Earth Jurisprudence, biocentrism or postanthropocentrism all of which would circumvent the African imperatives of restitution, restoration and reparations (Nhemachena *et al*, this volume). The argument here is that ecocentrism, biocentrism, Earth Jurisprudence and postanthropocentrism are all Eurocentric contrivances to evade restoring and restituting ownership of property and resources to (neo-)colonially dispossessed and robbed Africans. Pan-Africanism necessarily foregrounds Ubuntu-informed humanism and jurisprudence.

This chapter therefore, intends to critically examine the possibilities of crafting and implementing Pan-Africanist jurisprudence in the area of environment so that Africans can benefit from ownership and control of their resources. Contrary to Eurocentric postulations about earth Jurisprudence that decentres African human beings, this chapter argues that what is needed is a **Pan-African jurisprudence** for the environment and not necessarily **environmental justice** [that erroneously foregrounds ecocentrism] - which is how Eurocentrists are deceptively framing it. Put in

another way, there is a distinction between on the one hand Pan-African jurisprudence for the environment and on the other hand environmental jurisprudence or environmental justice in the Eurocentric sense. This chapter underscores the fact that whereas a Pan-African jurisprudence for the environment would take into cognisance the historic (neo-)colonial dispossession and exploitation of Africans, who have to be restituted and compensated; on the other hand bare environmental justice or mere environmental jurisprudence foregrounds the environment rather than the African victims of (neo-)colonial dispossession of the robbed Africans and their looted materialities. In other words, mere environmental justice or environmental jurisprudence leans more towards ecocentrism, Earth Jurisprudence and postanthropocentrism while on the other hand Pan-African jurisprudence for the environment leans more towards African Ubuntu humanism. So, the concept of Pan-African jurisprudence for the environment does not decentre the African human owners of the resources - it takes cognisance of the need to restore and retribute not only the damaged and degraded environments but to *a fortiori* restore, retribute and compensate the (neo-)colonially dispossessed African human owners of the resources.

Conceptualisation of Pan-African Jurisprudence for the Environment

To date, mining sector reforms in (neo-)colonised countries including in Africa have created favourable conditions for the foreign “investments”. The reforms in early eighties focused on withdrawal of state involvement especially the privatisation of state-owned large-scale mineral operations. Following the misleading advice of the World Bank (WB) and the International Monetary Fund, the focus of the nineties was then legislative and institutional capacity building for purposes of speeding up transnational looting and exploitation of African resources. These reforms are currently well defined in WB documents such as the 1992 strategy for African mining and the 1998 assistance for mineral sector development and reform in member countries. Hence, the government of Tanzania was recognised as a

key stakeholder in minimising risks that are associated with mining activities. According to Frick (2002) after a decade of reforms, foreign “investment” in the minerals sector mainly in Africa increased from \$200 billion in 1993 to about \$1.2 trillion by 2000.

The African states’ priority on foreign “investment” attractions in mining areas had various aims. First, the supposed contribution of mining to sustainable development strategies wherein the mining sector is characterised as an “enclave”, where foreign linkages exceed domestic linkages (Glazewski, 2003; Larsen *et al.*, 2009). Second, African states are not able to effectively monitor/enforce norms and standards because of financial, technical and managerial constraints. The main concern surrounding large-scale mining activities is the impact on the livelihoods of local African communities and the environment. For example, the impacts of gold mining on the environment are significant at all stages of a mine’s development, and have been extensively documented in a wide range of contexts. The extraction and processing of minerals disturbs land, water and air as a result of construction, excavation, dumping of waste rock, disposal of tailings and water runoff from mining and processing sites. Common to all extractive industries is the pollution and landscape modification that includes pits, waste piles, built structures, sand bars and turbid rivers. While the above challenges arise from the transnational corporations’ extraction of African mineral resources, this chapter argues that such environmental problems should not simplistically be understood in terms of what is being popularised as extractivism – the problem is founded in the resilient (neo-)colonial dispossession and looting of African resources. In other words, the criminality of transnational corporations lies not merely in extractivism but in looting and dispossessing Africans – the solution for transnational corporations is to restitute, restore and compensate dispossessed Africans. In short, the crime for the transnational corporations is to Pan-African owners of resources – the crime of transnational corporations is not to the environment itself but to its African owners. Pan-African jurisprudence for the environment places the African owners of the resources at the centre, it does not decentre the African human owners as would happen with Earth Jurisprudence or ecocentrism.

Over the past several years, social movements have arisen due to competition over resources between the transnational mining industries and local African communities living in/around the mining area in Tanzania. The complaints emanated from competition over resources including land, forests and water especially between subsistence farming communities and large-scale transnational corporation mining operations. As a result, various social movements emerged to struggle for justice. The theory of justice has been widely used in the assessment of the environmental burdens on certain social groups in a society (Schlosberg, 2007). The theory has been applied to evaluate community mobilisation and social movements in the context of justice around environmentalism of the dispossessed impoverished (Urkidi and Walter, 2011; McDonald *et al.*, 2003).

Whereas environmental justice involves struggles for equity, distribution and fairness to the marginalised communities, Pan-African jurisprudence for the environment foregrounds the exigencies for restoration, restitution and reparations to dispossessed African communities and individuals. While environmental justice promotes struggles for justice and resistance in areas impacted by mining operations, Pan-African jurisprudence for the environment takes cognisance of the histories of (neo-)colonial dispossession and looting and it posits that justice has to be deep enough to include restitution and restoration to the dispossessed. Though environmental justice brings to attention the ways in which exploitation of land and other natural resources is associated with exploitation of people, Pan-African jurisprudence for the environment urges for the need to notice that the (neo-)colonial history in Africa is not simplistically about exploitation, domination and oppression – it argues for the need to foreground dispossession and looting of African resources of which solution is restitution and restoration to the dispossessed. It notes that there are distinctions between on the one hand exploitation, oppression and domination and on the other hand dispossession and robbery. The robbed and dispossessed cannot simplistically be conceived as exploited, dominated or oppressed – robbery and dispossession go deeper than mere oppression, exploitation and domination and so there is need not to mistake robbers for mere exploiter, oppressors and

dominators. From a Pan-African point of view, transnational corporations and Euro-American states involved are not mere exploiters, oppressors and dominators but they are more fundamentally dispossessors and robbers.

While the procedural environmental justice calls for fairness, inclusiveness, representation, parity and communication with regard to ways in which decisions that impact communities are made (Bullard, 1994), a Pan-African jurisprudence for the environment foregrounds restitution, restoration and reparations to dispossessed African owners of the resources. Whereas environmental justice is concerned with ensuring community participation as well as looking at whether the process is designed to produce fair outcomes for all parties, that is, “investors” and community in the area, Pan-African jurisprudence for the environment foregrounds recompense and repossession of African resources. Corrective justice involves compensation of victims through the provision of full reparations for dispossession, damages and health interventions as needed (Kuehn, 2000). While distributive environmental justice refers to the fairness of the distribution of benefits and environmental risks borne by the marginalised people (Bullard, 1994), Pan-African jurisprudence for the environment foregrounds fairness in terms of restitution, restoration and reparations rather than mere redistribution of benefits. Contrary to social environmental justice that concerns itself with social equity via consideration of the social structures and agents that cause environmental problems to occur, Pan-African jurisprudence for the environment foregrounds human (neo-)colonisers that should restitute, restore and compensate dispossessed Africans – in other words, Pan-African jurisprudence for the environment does not simplistically animate and then blame social structures and equivocate “agents” for environmental problems. To better differentiate between environmental justice from Pan-African jurisprudence for the environment in Africa, two cases from mining areas of Tanzania and Ghana are presented:

Environmental Injustice: A Case of Gold Mining in Tanzania

All mining operations in Tanzania are governed by the Mining Act 2010 whereby all investors in mining industry have the obligation to pay royalties according to the Mining Act (URT 2010). Tanzania is blessed with precious minerals including uranium, diamond, copper, gold, gemstone, silver and platinum. Despite the presence of precious minerals in the area, many communities living in/around mining areas struggle to survive and some areas lack basic services such as water, health facilities and food. The question is whether the royalties are only meant for the “national” economic development or for the social well-being of the entire community. The other question that is raised is whether the mining corporations pay the royalties at all. Though the latter may not be possible under the 5th term government which ensures all “investors” in the mining industry pay taxes. In this regard, environmental justice can be realised under the current government initiative via effective implementation of the Mining Act 2010 and its amendments made in 2017 by Parliament of United Republic of Tanzania. Contrary to that, the history of riots and social movements in the mining areas can prevail. The following cases of gold mining operations in Geita gold mine (GGM) in Geita District, as well as the Bulyanhulu and Buzwagi gold mines in Kahama District, that is, the Lake Victoria Goldfields during 2007 and 2010 can be used to demonstrate the shortcomings of the notion of environmental injustice and ways to avoid them for sustainable mineral operations in the country.

Environmental Injustice in the Lake Victoria Goldfields

In recent years, compensation and resettlement are two activities that mining industries and government agents undertake to facilitate fair compensation and resettlement package for affected local people. Usually compensation process can be done via village leadership who are responsible for listing all items of the community to be compensated. The list is then validated by government field evaluators. Thereafter valuations are submitted to the Ministry of Land and Urban Development for final allocation of the actual

resettlement package. Makene *et al's* (2012) study in the villages located in Lake Victoria Goldfields of Tanzania revealed that people are complaining about the government assessments of values for their property. They argue that the valuations are not in harmony with local market values. This is due to lack of consistency between valuations within communities as well as lack of transparency in the process itself, particularly in cases where resource losses were not properly compensated. For example, communities complained that resources such as grazing lands, water sources, and forests for firewood were not taken into consideration in the compensation valuation.

The study by Makene *et al* (2012) added that, researchers witnessed compensation payments for people during the summer of 2007. It was revealed that the "... procedure was very confusing as people were given documents written in English, not Kiswahili, and pushed into signing and leaving before they were even given their compensation check...". Besides, "... people were not compensated for their water sources and were not provided with alternative clean water sources (except in Bugarama)..." (Makene *et al.*, 2012: 9). As a result, some claimants refused to take their monetary compensation; others would not sign for the payment until the form was translated into Swahili. These causes of complaints and social movements of the communities living in/around the mining areas can be "avoided".

In addition, about seven households at Nyamalembo village remain within areas that are demarcated for mining activities. These people refused to leave because they were not fairly compensated for their assets. Hence, due to their close vicinity to the active mine, they continue complaining about frequent floods during the rainy season, air and noise pollution from blasting activities. Moreover, people living in these areas were denied social services from the government since they reside in the mining territory and in one case an elderly couple had to lie on their ancestor's grave to prevent the mining company (that is, AngloGold Ashanti) from "exhuming the remains of their ancestors without a proper (that is, culturally appropriate) transferring procedure" (Makene *et al.*, 2012: 10). Therefore, people feel that the valuations for compensation were not fairly conducted: what was paid does not reflect the actual market values of their assets,

and then, in spite of inadequate compensation, they are still forced to live in a situation where “adequate forms of corrective justice are absent”.

Reported cases from GGM revealed that about 17 cows died after drinking water from a mining tailings pond in July 2007 (Makene *et al.*, 2012). Respondents added that it was not the first time for this to happen in the area, and AngloGold Ashanti’s response was that these cows trespassed in areas belonging to the mining company, though there was no fence. A different story was given in Nyamalembo focus group interview whereby the village chairperson agreed to receive compensation for the 18 cows that died after drinking water from a mine tails pond. Poor implantation of the corporate social responsibility (CSR) can be realised from the GGM and Bulyanhulu mining of which areas are supplied with reliable water supply pumped from Lake Victoria. On the other hand, the neighbouring villages depend on water sources they have been using since before the beginning of mining operations in the area. Besides, a number of complaints, from the community, about pollution to water sources have not received immediate action for prevention and environmental conservation measures.

Environmental Injustice in Ghana: A Case of AngloGold Ashanti in Obuasi

The Ashanti Goldfields Corporation has been in mining operations since 1897. The AngloGold Ashanti (AGA) has been identified to be the main “stakeholder” in the development of Obuasi - it provides social infrastructures and financial resources for the District, and it sponsors community events such that in 2011 AGA provided about 103,000 USD for construction of school buildings (Akabzaa *et al.*, 2007). However, local mining activists and government officials perceive AGA’s contribution to the local economic development differently. For example, local people argued that mining has been in Obuasi for more than 130 years but there has been nothing for local people. This was due to lack of strategic development of Obuasi considering that gold mining is not conceived as fiscal planning and development such that towns are

not properly structured and developed. Hence, for the communities, gold extraction is accompanied by visitation with impoverishment.

To date, there are ever-increasing trends of mining operations failing to benefit the local community living in/around mining areas economically. For example, Hilson (2004) documented that the push to make minerals extraction more attractive in West Africa have created a favourable foreign “investment” climate but with negligible economic benefits to the local community. In addition, investments in mining sector in Obuasi and Tarkwa have failed to increase employment to the local community contrary to earlier expectations. According to Akabzaa *et al* (2007), gold mining activities have resulted in various environmental problems including land, air and water pollution, which lead to cyanide leakages and the loss of biodiversity in the area. Considering the situation in the mining areas, the presence of effective utilization of the corporate social responsibility policy can mollify social movements and reduce the attendant riots in the mining areas of Ghana.

Crafting and Implementation of the Pan-Africanist Jurisprudential Model of Justice

Many countries in the World are experiencing social movements resulted from communities’ perception that “investors” and/or “governments” do not offer equal sharing of earnings from the natural resources including minerals, forests, land and water. For example, over the past several decades, social struggles over the increase of corporate mining activities have intensified in many parts of the world where there are conflicts over access to resources and for the defence of livelihoods (Avci, 2015). These movements have been hampered by different factors, mostly by lack of political space, human and financial resources, and legal support. Needed is not only the crafting and effective implementation of successful equity sharing models including inclusive business models, but needed also is a Pan-Africanist jurisprudence for the environment wherein restitution, restoration and reparations would be at the forefront of calls for justice in Africa, and the (neo-)colonised world more generally.

Adekunle Ajala (1973) noted that Pan-African movement was initiated by Williams in 1900 whereby the conference participants were African descendants based in the United States and the West Indies. The movement has emphasised Pan-Africanism and a shared interest in promoting economic justice for the entire African Diaspora. Hence, while Pan-Africanism remains a viable ideology and praxis, its adherents must create a more relevant multilateral dialogue and form new alliances to oppose and reverse the harmful effects of Euro-American-led (neo-)colonisation of Africa

The (neo-)colonisation of Africa has historically occurred in the guise of economic development and civilisation projects. Similarly, post-independence economic reforms in many African countries including Tanzania involved the imposition of debt recovery programs by Eurocentric institutions particularly the International Monetary Fund (IMF) and World Bank. The preconditions for debt recovery programs entailed a myriad of measures such as privatisation of state-owned enterprises, emphasis on export-led growth, removal of subsidies, abolition of tariffs, dismantling of state marketing boards, liberalisation of foreign exchange regimes and reductions in public expenditure (Nyankweli, 2012). Despite the apparent goodwill of these reforms, the indigenous people received little benefits. There is now evidence of major redundancies in public sector caused by World Bank and IMF reforms in Africa (Banchirigah, 2006).

In Tanzania for example, following implementation of the structural adjustment programmes (SAP) in 1986, more than 50,000 civil servants were immediately retrenched. While in Ghana, following the implementation of reforms, 80,000 job positions were lost on the Cocoa Board and 45,000 civil servants were immediately redeployed. Usually governments and communities had expectations that the foreign multinationals that opened mines under the SAP were capable of providing employment to indigenous people especially rural communities living in/around the mining areas. However, the majority of mining industries are on a large scale and thus highly mechanised leading to very few job opportunities for local people. This has resulted in significant growth of artisanal small scale mining (ASM) and conflicts in mining areas. The United

Nations report documented a significant increase in the number of men and women involved in ASM worldwide amounting to 13 million population in 1999 (ILO, 1999). The World Bank estimates revealed about 200,000 people in ASM within Ghana in 1995 (Hilson and Potter, 2003), a population of 100,000 ASM in Guinea in the year 1990 (Crispin, 2003) and estimated population of 100,000 ASM in Tanzania in the early 1990s (United Nations, 1996).

The named growth of ASM in many African countries, made researchers to probe the driving forces for the ASM whereby neoliberal industrial reforms and the associated expansion of largescale transnational corporations' mining was found to be the main factor for the growth of ASM economy particularly "illegal" artisanal mining activities. "Illegal" mining operations pose serious problems to many African governments and policy makers including pollution to land, air and water sources, poor safety, unsanitary conditions as well as increased social ills (e.g., prostitution, HIV/AIDS). In addition, "illegal" mining operations can be the reason for riots, social demonstrations, human disability, and even death of people living in/around the mining areas. Moreover, there is documentation of several cases of environmental damages that transnational corporations are causing in African countries including Tanzania, Ghana and Zimbabwe. According to Mead (2005), gold extraction from arsenopyrite ore in the Obuasi region of Ghana resulted in the release of airborne Particulate Matter (PM) that includes large concentrations of Arsenics (As). In Tanzania and Zimbabwe, the highest exposure to vaporised elemental mercury (Hg) occurs during burning to separate gold from the gold - mercury amalgam whereby up to 1.46 g of mercury is lost to the environment per gram of recovered gold, and 70-80% are released to the atmosphere (van Straaten, 2000).

Based on the social and environmental impacts of mining operations in Africa, drafting and/or adoption of successful business models is necessary for improved livelihood of the community living in/around the mining areas as well as sustainable growth of mining industries. Inclusive business models have been widely used in different business sectors including agriculture, breweries and manufacturing industries as means to facilitate the integration of

smallholders, that is, low income communities into the business value chains (Hahn, 2012; FAO, 2015). These models are usually implemented by organisations in many ways based on the nature of the organisation as well as willingness to adhere to the corporate social responsibilities (CSR) and specific countries' investment policy needs. To date, implementation of inclusive business models by extractive industries at first hand seemed to be impossible. Firstly, many companies in the extractive sector are multinationals that are capital and technology intensive, and their focus is on extraction rather than production whereby the scope of inclusivity is so low. In addition, they are capable of providing only a minority of direct employment in the best of cases relative to the income generated (Hilson, 2012). In this regard, the question on how, and where can such a capital-intensive and Labour-free frameworks support the poor to enter the supply chain as clients, customers, producers and business owners is yet to be answered by the majority of mining industries in Africa.

According to the UNDP (2008), inclusive businesses are those that engage the poor along the entire supply chain either as clients and customers or on the supply side as employees, producers as well as business owners. For example, UNILEVER inclusive business model is projected to benefit livelihoods of about 500,000 smallholder farmers by 2020 from the company earnings. Besides, the case of the Dutch beer company Heineken best describes implementation of inclusive business models as fulfilment of the CSR. The Heineken beer company has managed to increase its raw materials production in Africa to reach 46% in 2012 such that the target by 2020 is to have 60% of raw materials sourced locally to brew their beers (Virah-Sawmy, 2015). Importantly, the company did so at the same cost as using more competitive imports through innovative solutions to address the hurdles in the supply chain. Hence, such models are hardly used in the extractive industries. Instead, "investors" in extractive industries have opted for the (CSR) policies as a means to share company benefits with community living in/around mining areas, though to a lesser extent.

The implementation of CSR in mining sectors is a challenge. The non-renewability of minerals is perceived to be the main challenge

upon implementation of the CSR by extractive industries. Besides, the notion of sustainable mining practices is problematic given the non-renewability of the materials being extracted, and thus, many practitioners prefer to use the term responsible mining for CSR policies in the mining industries. Moreover, it has been argued that sustainable mining can be applicable in presence of effective conversion of the natural capital, represented by the mineral resource, to social capital that allows long-term socio-economic gains (Ali and Faircheallaigh, 2007). In addition, disaggregation of what CSR policies are and how they contribute to sustainability is critical. For example, O’Faircheallaigh (2007) undertook an extensive review of the relevant literature such that these policies were grouped into four outcomes including human rights, biodiversity conservation, economic efficiency and social license to operate. The approach has encompassed most recent developments in different initiatives mainly extractive industries transparency initiative and inclusive business models. Following the key outcomes of the CSR, the entire community would benefit a lot if at all implemented (Fig. 1).

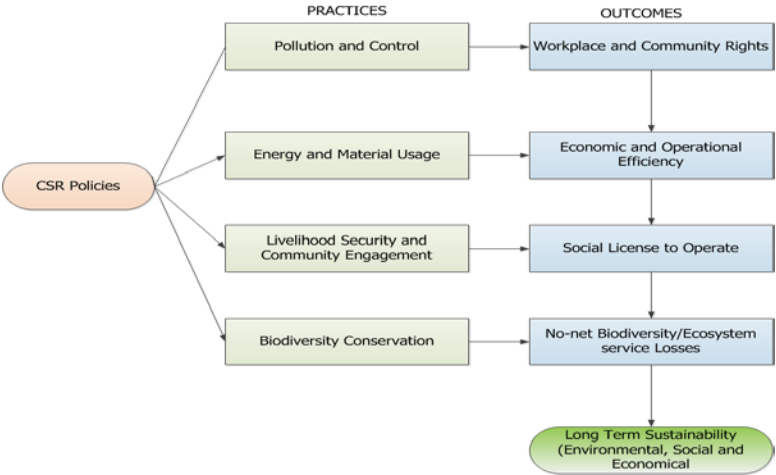


Fig. 1: Implementation of CSR practices and outcomes (Modified from, Virah-Sawmy, 2015)

In summary, whereas the mission and vision of the Pan-Africanist jurisprudence for the environment would prioritise

restitution, restoration and reparations, the Eurocentric environmental justice model would focus on the neoliberal inclusive business models, which are in most cases implemented by extractive industries under the umbrella of the CSR. The historical failures of environmental justice movements calls for review in the sense of shifting attention to a Pan-African jurisprudence for the environment which is more profound and more relevant to the interests of (neo-)colonially dispossessed Africans who need their resources back. Restitution, restorations and reparations will ensure peace and harmony in all mining areas as African communities will not merely accrue benefits from the foreign owned mining activities, but they will also own and control the mining activities.

Conclusion and Way Forward

The issues on environment, mining, interventions and Pan-Africanist model of justice have been discussed in relation to the Lake Victoria gold fields in Tanzania and Obuasi gold mining in Ghana. It has been argued that there is need to shift from the Eurocentric environmental justice model to a Pan-Africanist jurisprudence for the environment model that priorities restitution, restoration and reparations to (neo-)colonially dispossessed Africans. Transnational mining corporations do not fulfil their corporate social responsibility promises to the African local community and so the Eurocentric environmental justice model is not useful in ensuring that Africans repossess, own and control their resources. In other words, there is no justice for Africans in the Eurocentric environmental justice model. In any case, there is a wrong assumption in the environmental justice model that there can be justice to the environment even if prior to the realisation of justice to (neo-)colonially dispossessed Africans. For there to be justice, it is necessary to first address and redress (neo-)colonial dispossession of Africans. It is only an irrational, illogical and underhand Eurocentric jurisprudence that would try to leap frog the restitution, restorations and reparations, which are due to (neo-) colonially dispossessed Africans— first things always, have to come first.

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Towards a Jurisprudential Theory of Migration, Foot-looseness and Nimble-footedness: The New World Order or Pan-Africanism?

Oliver Mtshuri, Artwell Nhemachena & Everisto Benyera

One of the paradoxes of the making of African nations and African identities is the recent metamorphosis and mutations of African nationalism from civic principles founded on the slogan of 'diverse people unite' to narrow, autochthonous, nativist and xenophobic forms that breed violence...The central challenge in the struggle of forging stable African identities remains that of how to negotiate and blend together diversities of race, ethnicity, religion, gender, class, religion, region, language, culture, generation as well as how to deal with the phenomenon of degeneration of plural and civic forms of nationalism into nativism, xenophobia and even genocides in recent years...These issues need serious and unsententious consideration at this juncture when African leaders are busy toying with and implementing the mega-project of establishing the United States of Africa (Ndlovu-Gatsheni, 2010: 281).

Introduction

While transnational corporations, for instance, enjoy the near absolute freedom of mobility across the world, nimble-footed Africans who happen to cross their national and continental borders are often quickly reminded about the shortcomings of transgressing national and continental borders. Even though Eurocentric academics and scholars are currently urging Africans to be as transgressive, as they want - to cross legal boundaries, transgress sexual binaries between male and female, men and women, girls and boys, to transgress their cultural boundaries, to transgress their Ubuntu-informed ethics, morality and laws; Euro-America is busy closing its borders for African immigrants. In other words, Africans are urged to transgress their humanism and to become transhuman

and posthuman even as Euro-America is paradoxically busy building walls, installing radars, scanners and other technologies to debar Africans from transgressing Euro-American territorial borders. Besides, while Africans are urged to transgress their nationalism including national laws and indigenous humanistic cultures, the same Africans are not permitted to transgress legal, economic and epistemic parameters that are set by Euro-America at a global level. In other words, Africans are urged to transgress what is African but never to transgress what is Euro-American – sanctions and wars are visited on those that transgress what is Euro-American even as Euro-America is paradoxically busy urging Africans to open up their societies, their bodies and nations to Euro-American penetration, in both literal and metaphorical senses. In other words, Euro-America is busy rejecting those that it has invited to transgress their own African borders, cultures, epistemes, laws, customs, economies and sovereignty. Put differently, Africans who transgress their own cultures, laws, customs, nations, families, marriages, genealogies, kinship systems and so on are rejected by the Euro-American world that paradoxically urges them into transgression. Even though some are absorbed as migrants into the Euro-American borders, they remain underdogs in the foreign systems wherein they face racial discrimination, oppression and domination.

Thus, while it is argued from a Eurocentric perspective that [African] territories are processes and that borders are multilayered social constructions or human creations (Zimmerbauer *et al*, 2017; Brunett-Jailly, n.d.) to be deconstructed and decomposed, we argue here that Euro-American academics and scholars paradoxically urge the deconstruction of African borders even as Euro-America is busy fortressing its borders to prevent African transgressors from immigrating. So, though African migrants to Europe are often described by European governments - that establish fences, seal off maritime borders, install radars - as tidal waves of desperate people fleeing poverty and warfare at home (de Haas, 2008), Euro-American transnational corporations are conveniently described as “investors” and consequently deemed to be so legitimately footloose as to deserve to freely comb the entire world in which for instance they are not controlled by African host states. Thus, even as some civil society

organisations, some of which are funded by the transnational corporations, urge African societies to be open, to become open societies for the transgressive Euro-American institutions, and for transnational corporations and NGOs which defy jurisdictional boundaries (Tavares, 2004; Lunstrum, 2009; Ortiz, 2016; New York Times, 17 October 2017), Euro-American states are ironically closing off their borders to African immigrants. African states are being unmade by Euro-American states and institutions through jurisdictional deterritorialisation, wherein Eurocentric supranational organisations have detached some fundamental legal and regulatory authority from the states (Lunstrum, 2009; Ortiz, 2016). It is often argued that Euro-American states have rights to control immigrants and to protect themselves against African terrorists and immigrants that supposedly expose them to terrorism (Tavares, 2004; The Washington Post, 22 December 2017). What is often forgotten is that transnational corporations that dispossess and exploit Africans are in fact engaged in terrorism – they are effectively terrorising Africans.

Under the guise of promoting toleration for diversity in Africa, Euro-American states, corporations, institutions and “civil society organisations” seek to create open societies out of African nation states and the African regional organisations wherein borderlessness is being spuriously promoted (New York Times, 17 October 2017; Kornegay, 2006). Transnational corporations and institutions are busy displacing African nation states - that are encouraged to open borders to foreign “investments” and new technologies (The New York Times, 26 January 2018). Thus, Open Society Foundations are receiving billions of United States dollars in the name of Eurocentric democracy and human rights: the foundations are supposed to open up the global south to infiltrations, penetration by Euro-American individuals, corporations, states and cultures including transgressive gay and lesbian cultures (The New York Times, 17 October 2017). In other words, we argue that there is nothing democratic, nothing toward and decolonial in contemporary tropes about openness to penetration; in fact historically, colonisation was underwritten by discourses of openness, transgressions, borderlessness and emptiness of the targeted precolonial states. Put succinctly, the contemporary discourses about openness merely replicate the liberal Lockean

discourses about the supposed emptiness of the precolonial states that were targeted for penetration and colonisation. Colonialists, in other words, who sought to rob precolonial African states strived to justify their robbery by portraying the victims of robbery and looting as supposedly having been at fault for being open and not closed – it is a case of colonial looters who justified their crimes on the pretext that the victim precolonial African states were at fault for leaving the doors open for penetration (Nhemachena, *et al*, 2017). Therefore, whereas Locke portrayed precolonial African states as open and empty, he paradoxically portrayed Euro-American states as closed, bounded and therefore protected by the Euro-American sovereign states (Nhemachena, 2016; Nhemachena *et al*, 2017). Thus, the logic in Locke's postulations was that the African and other states that were targeted for colonial penetration were supposed to be open while the colonising Euro-American states were supposedly closed and therefore not open to reciprocal penetration. Thus, similar to (neo-)colonial assumptions that (neo-)colonised African bodies were/are supposed to be always open for penetration by the Euro-American other, African states and the entire continent are also urged to open up to penetration by the Euro-American others that are supposedly equipped with the (neo-)colonial phallus that is often conveniently called foreign “investment”, “civilisation”, “development” or “modernisation”. In this regard, indigenous Africans have for centuries been ideologically modelled to crave for these kinds of invasive and transgressive (neo-)colonial phalluses that not only penetrate but also rupture the sovereign-trajectory of the African continent. In other words, the underlying logic of Euro-American thinking is that the open and penetrated Africans cannot conceivably be sovereign – it is only the phallus-wielding penetrators and perpetrators who arrogate sovereignty to themselves.

To render Africa flat, Pan-African ideals have been alleged by some antagonistic writers to be premised on invented traditions of shared ancestry, communitarian values, common heritage and vision (Asaah, 2007). Understood as self-acknowledgement of a shared origin, shared history, and cultural linkage between peoples of African descent (Clark, 2012; Adi *et al*, 2003; The Namibian, 1 November 2010), Pan Africanism is heavily resisted and criticized by

Eurocentric scholarship and practitioners some of whom even go to the extent of staging postmodern counter-revolutions against Pan-Africanist leaders with a vision to set up a United States of Africa (Perreira, 2011). Therefore, the 21st century struggle against the Pan-Africanist Libyan leader Muammar Gaddafi was fundamentally a battle between Pan-African forces on one hand [who were dedicated to Gaddafi's vision of a united Africa, with one currency, one army and shared vision] and on the other hand Libyan Arab forces who rejected Gaddafi's vision of Libya as part of a united Africa (Perreira, 2011). Thus, whereas Pan-Africanism would privilege Pan-African essence, identities and solidarities, the contemporary postmodern counter-revolutions against Pan-Africanism privilege cybercultures or cyberspaces that speak to deterritorialisation and reterritorialisation of Africa – cyberidentities within the cyberspaces are deliberately not necessarily supportive of Pan-African identities, rather they are often counter-African identities. In fact, cyberspaces offer spaces wherein transgressive African minds can migrate virtually even as the Africans are paradoxically debarred from physically migrating to Euro-America - which create the virtual cyberspaces as the substitutes of the physical migration. In this regard, we argue that whereas some Africans might think that contemporary Eurocentric postulations about debordering, borderlessness and openness are meant to create an open world without physical borders, in fact Euro-America is tightening its border controls and patrols. In other words, Africans are supposed to contend with virtual cyberspaces, which are also sites for the deterritorialisation and reterritorialisation of African states. The virtual cyberspaces not only help Euro-America to deconstruct and decompose African nation states but they also help to migrate and deterritorialise African minds towards the emergent New World Order with a Euro-American One World Government. In other words, the openness that is envisaged in the New World Order is not premised on Pan-Africanism – it is in fact antithetical to Pan-Africanism and its associated African Ubuntu-informed collectivist identities, which have for long been thorns in the flesh of (neo-)empire. While cyberspaces including social media are often appropriated for the benefit of Africa, it is imperative to note that

social media was utilised during the postmodern violent protests or counter-revolutions [that did not necessarily result in the improvement of the livelihoods of concerned Africans] in Libya and other states of North Africa. Thus, social media can be used to fight Pan-Africanism - to launch revolutions that counter Pan-Africanism.

Pan-Africanism, which assumes shared cultural visions, respect for the citizens' human rights, security, peace and stability (Sebola *et al*, 2015), has become a victim of assaults from Eurocentric processes of deterritorialisation and reterritorialisation (Deleuze and Guattari, 1987) wherein African minds are migrated from their localities and nation states to the realm of cyberspace that is not governed by the African nation states and other local indigenous African authorities. Conceptualised as the growing presence of social forms of contact and involvement, which go beyond the limits of a specific territory, deterritorialisation speaks to loss of natural relations between culture and the social and geographic territories (Gil-Manuel, n.d.). In other words, deterritorialisation is the "globalisation" of everyday experiences such that it is ever more difficult to maintain a stable sense of cultural identity, including national identity (Gil-Manuel, n.d.). Apart from breaches of aerial private spaces of African nations over which there are deliberate space flights by Euro-American states (Dhanda *et al*, 2012), Euro-America is anxious to enhance its virtual distributed presence in the New World Order where face to face conditions are not necessary and are therefore substituted by a sense of belonging to the group or immersion in the group with shared social identity without face to face relations (Rogers *et al*, 2010). The emergent New World Order is supposed to be based on networks or distributed work in which objective proximity is not necessary for people to perceive themselves as proximate, collaborative, interactive, collocated or in collaborative virtual environments (Hinds *et al*, 2002; Tate *et al*, 2014; Waterworth *et al*, 2014; Juan *et al*, 2000). With inventions of technologies that allow for virtual sex or cybersex between distant partners in different parts of the world, physical migration will be reduced much as e-commerce, cybereconomies and e-governance are reducing the imperatives of physical migration or movement of people (Nhemachena *et al*, this volume).

While some thinkers assume that colonialism was simplistically about setting up fixed borders or setting up territories, we argue here that colonialism was about destroying precolonial African territories and nation states – colonialism was about transgressing the borders of precolonial African states (Bothwell, 1998; Rice *et al*, 2015; Scheibelhofer, 2010). In this regard, the contemporary Eurocentric promotions of tropes of transgression of borders, the provisions of deterritorialised and reterritorialised cyberspaces that are destabilising and transforming African ideas about home, homeland and nation (Marino, 2015), have got foundational logics in colonial destabilisations, transgressions, deterritorialisations and reterritorialisations wherein precolonial African states were decomposed. Whereas other scholars argue that in the colonial system there was much dependence on clear boundaries and with fixity of the colony's territorial borders (Bothwell 1998), we argue that the (neo-)colonial systems are about transgressing pre-existing precolonial African boundaries. Colonialism was about effacing precolonial African boundaries or borders and merging them with imperial boundaries. Thus, the underlying logics of the contemporary postulations about assemblages supposedly emanating from Euro-American processes of deterritorialisations and reterritorialisations (Duffy *et al*, 2017) are nothing new – (neo-)empire is at its base an assemblage yet it is neither Pan-Africanist nor decolonial in essence. (Neo-)empire is a (neo-)colonial rather than a decolonial phenomenon and so contemporary decolonial jurisprudence needs not be premised on simplistic (neo-)imperial assemblages.

Although processes of deterritorialisation are noted to include processes of reterritorialisation, Patton, (2010) notes that these processes do not entail returning to the original territory but rather they refer to the ways in which deterritorialised elements recombine and enter new relations in the constitution of a new assemblage or the modification of the old. In other words, deterritorialised and reterritorialised Africans are effectively swallowed and digested in the ever-intensely anthropophagic and cannibalistic New World Order or (neo-)imperial world. The emergent New World Order also discards, institutionalises, incarcerates and expels some African migrants particularly those that are not readily digestible and

swallowable by (neo-)empire (Cohen, 2017). Subjected to unreasonable searches and seizures, identity verifications at airports, in trains and on highways or at roadblocks (Mbembe, 17 March 2017), Africans are sifted and sorted accepted and rejected in a supposedly open, inclusive assemblage of the New World Order. Thus, Ndlovu-Gatsheni (2017: 24-37) argues:

The reality of an emerging transnational Africanity (Pan African citizenship) must be taken seriously in African people's rethinking/decolonizing colonially imposed boundaries. This will entail resolution of the tensions between narrow territorial nationalism and broader pan-Africanism. This is important because pan-Africanism is always undercut by realities of territorial nationalism and its state-centric and elite notions of security that criminalise African migration. But it is clear that pan-Africanism remains the only idea and template amenable to the African dream of creating a common pan-African identity. Therefore what needs to be escalated today is African people's demands and claims for continental citizenship on the basis of pan-Africanism. There is urgent need to banish such colonially sounding exclusionary and degrading terms like "undesirable", "alien", "foreign" and "illegal" Africans from our postcolonial vocabulary and from our dealings with fellow African people...The thinking about borders in postcolonial Africa seems to be also informed more by economic imperatives than humanistic ethos. This is why it is easy for capital and goods to move across borders than people. This same thinking rooted in mercantilist colonial thought is one that makes Africa open to people coming from Western capitals whilst remaining closed to its own inhabitants.

Because we do not subscribe to the complete effacement of African nation states, we appreciate the fact that home affairs departments and border migration offices in many African nations work around the clock to process migration documents and "regularise" these movements. The idea here is that primary to Africans are not matters of diversity, plurality or openness but matters of (in)security including from Euro-American plunder, looting, dispossession and from the Euro-American military-

industrial complex that incites civil wars among Africans (Nhemachena and Mawere, 2018). The prevalence of coups and general instability in Africa, where state security is increasingly being disrupted and replaced with private security and mercenaries funded by marauding transnational corporations, underscores the imperatives of regulating migration on the African continent including within nation states and localities. The fundamental idea does not necessarily have to be about including everyone or openness to everyone who wants to migrate to the continent, rather the crucial idea should be about ensuring security for indigenous Africans who cannot afford to risk a replication of the logic of colonisation and its attendant insecurities. In other words, a Pan-African jurisprudence does not have to prioritise openness, inclusivity or borderlessness – rather it has to balance these aspects with the security of indigenous Africans who also deserve restitution and restoration from former colonisers and their descendants. Pan-African jurisprudence needs to assist in the decolonisation of Africa and decolonisation in this respect entails the making good of (neo-)colonial looting, dispossession and exploitation. To assume that borders are open, that there are no boundaries and borders effectively translates to denying restitution and restoration to Africans – currently international claims and legal suits for reparations, restitution and restoration have to be done by African states representing their citizens. What this means is that once African nation states are effectively effaced via discourses of unqualified borderlessness, openness, inclusivity and so on, there will not be any states in existence to challenge Euro-American (neo-)colonisers to reconstitute, restore and pay reparations to African (neo-)colonial victims of dispossession, looting and exploitation. The transnational corporations' support to debordering, openness and unqualified inclusivistic discourses are not any cause for wonder in a world where the transnational corporations that participated in (neo-)colonial dispossession and exploitation of Africans stand to gain from the attendant decomposition and deconstruction of African state power. The existence of African states threatens the transnational corporations with legal suits on behalf of indigenous African citizens and so global capital prefers statelessness and borderlessness as the model of the future world. To sue for genocide,

the litigants need to identify the states responsible yet the current tropes about borderlessness and statelessness threaten to efface the state as a subject of litigation in such cases.

In the light of the foregoing, we argue that Eurocentric postulations about debordering, openness and unqualified inclusivity are not necessarily motivated by support for Africans' quests for migration or African concerns about Afrophobia. Rather the motivation lies in disrupting, deterritorialising, reterritorialising and destabilising African nation states some of which are currently being relied upon to institute international legal suits against (neo-)imperial dispossession and exploitation on behalf of indigenous people. As much as cross-border migration is an inescapable reality, we note that some African governments have introduced 'strict' or rather prohibitive migration policies and laws as they seek to control and regulate the movement and stay of African "foreign" nationals in their countries. As such migration laws have become topical and in some instances even controversial at best and unnecessarily Afrophobic. However, in the African context, imposition of some of these prohibitive Eurocentric migration laws appears to stand in direct contrast with calls for a return to doing things the 'African way' which embraces the spirit of Pan-Africanism. Drawing on the jurisprudential theories underlying the principles of freedom of movement, justice, human rights and right to heritages including culture, this chapter critically interrogates migration, the New World Order and Pan-Africanism. The chapter views migration by African peoples across the continent as historical, economic, political, religious and cultural rights that are being trampled upon. Unpacking issues of migration and movements from precolonial Africa where Africans freely moved around, this chapter argues for a Pan-Africanist jurisprudence on migration. It notes that there is evidence of free mobility [which does not necessarily suggest absence of precolonial African states] of Africans, for example, in the precolonial commercial trade routes across the continent. If, as is the case, precolonial Africans could move freely in their commercial and trading activities, we wonder why some contemporary Africans have become so intolerant to their African brothers and sisters that are

often subjected to merciless Afrophobic attacks – sometimes backed covertly and overtly by host African states and governments.

Migration in Africa

The African continent is experiencing increased migratory flows or mobility involving men, women and children in both internal (within Africa) and external - beyond the continent's boundaries. If men used to lead the migration process followed by the women and children, now women and even children are migrating on their own. Migration of people on the continent is a result of the push factors from countries of origin – manifesting in a hostile environment and pull factors in destination nations – as embodying the perceptual greener pastures (until the nationals view the immigrant as a threat). Immigrants tend to work, even in harsh and antagonistic environments, twice as hard as locals, hence the source of the threat. They have to prove themselves and excel in the work that they do. This applies to both legal and illegal documents. The threats to non-renewals of documents and denial of passports to visit relatives and friends are common but do not deter immigrants to work. Adepoju (2004) and Whitwell (2002) observe that mobility on the continent has increased significantly as a result of a plethora of political and economic crises in Africa. The origins of these crises are both internal and external. The economic crises have often preceded political crises. Equally, a political crisis can also lead to an economic crisis as countries become ungovernable and citizens cannot engage in economic activities due to hostile political environments. Street violence and war asphyxiate and stifle economic activity. Normal business and trade cannot thrive in situations of violence and war. In some cases, government incapacity, corruption, poor management and utilisation of resources, wasteful expenditure, and political intolerance are constitutive of internal factors. External factors include political interference and manipulation by external powers in the affairs of African countries including atrocious and wicked terms of trade, theft and plunder of natural resources, which leave whole countries destitute, abetted by corrupt leaders. There is merit in the argument that economic decisions are also political decisions, this

blurs the boundaries between economics, and politics both of which are propelling migration.

Migration has always been a part of the African way of life since time immemorial. Observations have been made by Bilger and Kraler (2005: 8) that ‘migration and mobility have always been central themes in scientific discourses over Africa’, and that the phenomenon is a topical subject area on the continent and that the continent itself has a long history of migration (Shimeles, 2010). Mobility is actually deeply entrenched in African history to the extent that it is impossible to talk about Africa or its economic, political, socio-cultural history and not include the subject as part of the discussion (Adepoju, 2004; van Dijk Foeken and van Til, 2001). Bilger and Kraler (2005) posits that the rise of African migration as a scientific discourse also links to the social and economic development of the continent. Migration has socio-economic, cultural and political dimensions. The social dimensions are concerned with livelihoods of migrants, their health, wealth, well-being, education, happiness and their participation in the new community in which they find themselves, their sense of identity and belonging undergirded by place making as a philosophy. The economic dimension is about their productive capacity and capabilities, their entrepreneurship, their markets for goods and services, and their assets (and liabilities) as individuals and as a community. The cultural dimension includes the values, customs, totems, rituals and taboos of migrants. The political dimension relates to the politics, the polity, the systems and process of governance, government and governmentalities prevailing in a given location. The conflation, convergence and divergence of these dimensions in a given locality which has its own dimensions but configured differently, invokes a diversity of opportunity and capabilities within the new community leveraging on varied capabilities and know-how, inherited practices and lived experiences.

The continent has, thus over the centuries, been experiencing movement of people both in form of small scale, large scale, localised as well as long distance migration which transcend territorial boundaries for different reasons and the trend is on the increase in contemporary Africa. Nshimbi and Fioramonti (2014) argue that

international migration in Africa has escalated mainly due to liberalisation of African economies, as people moved in and out in search of better socioeconomic opportunities. It is for this reason that a number of migration-related descriptions were proffered about the continent. For instance, Castagnone (2010) called it a continent on the move while de Bruijn *et al.* (2001) described it as an immensely mobile continent. The World Migration Report by IOM (2005:33) also argued that Africa is ‘the continent with the most mobile populations in the world’. Mobility can be cherished if it benefits the people and countries. Mobility becomes problematic if it is forced by circumstances. The following section examines migration in the pre-colonial African context.

Pre-colonial African Migration Patterns and Practices

Migration in Africa before the advent of colonialism was motivated by a wide range of factors, most of which bear some semblance to those driving it today although in different historical and locational contexts. Pre-colonial migration in Africa was largely done for security reasons as well as in search of new and fertile land for settlement, farming and other economic purposes (van Nieuwenhuyze, 2009; Adepoju, 2005). Nomadic groups of Africans used to move from one place to another in search of new pastures and water to sustain themselves and their livestock. Once they had secured a suitable area, they settled there until they felt that there was a need to move. That is when they would once again look for a new place to settle. The resilient logic of nomadism also underlies the contemporary footlooseness of transnational corporations that hop from one place to another in the world, and so Nhemachena and Dhakwa (2017) have called them “contemporary global hunter-gatherers”.

Instrumental in inducing migration was also the practice of trading with other African indigenous people. In this case, precolonial people would travel to far away areas for the purposes of securing trading opportunities, which were not available in their local areas or to get goods, which they could not manufacture, on their own. Such items that encouraged travel for trade from as early as the

10th century include salt, minerals such as gold, spears, axes, hoes, the trading of cloth which precolonial Africans wove from “wild” cotton, animal hides, ivory and spices (Adepoju 2004; Ellert, 1984; Nhemachena and Dhakwa, 2017). In the same vein, “ethnic” groups would also welcome visitors from far-away places who visited their territories for trading purposes. It is important to note that trade-based migration involved crossing territorial boundaries (equivalent to present-day national boundaries) into ‘foreign’ land belonging to other “ethnic” groups. van Nieuwenhuyze (2009) cited the example of the Fulani people who occupied the Sahel region as one of the largest groups that transcended into areas known today as Niger, Burkina Faso, Mali, Ivory Coast, Senegal and Nigeria. These trans-boundary movements were also a result of temporary or seasonal migration networks between kingdoms and they played a critical role in sustaining regional livelihoods for a very long time. This implies that these interchanges and exchanges between people, services and goods were part of their livelihood strategies.

Thus, Ellert (1984: 2- 87) observes that:

Intercontinental trade was one of the most important activities of the Zimbabwe state which maintained such relations with sea borne traders through the coastal outposts...the Njanja iron trade which flourished during this Portuguese era up until after 1890...The gradual decline of the local cloth and iron industry accelerated after the effective seizure and annexation of Zimbabwe in the 1890s by the administration of the British South Africa Company which marked the beginning of the colonial era in Zimbabwe’s history...The behavior of such men showed the lack of regard Europeans had for African culture and history. The idea that Africans possessed cultural values and a civilization independent of European culture was either inconceivable or suppressed as a threat to their own plans. This attitude was latter demonstrated in 1970 when the Rhodesian Front regime instructed that no official publications should state that Great Zimbabwe was without doubt an African creation...The spinning and weaving of cotton cloth was already being practiced in Zimbabwe in the 13th century and possibly earlier than that. Because the climate on the Highveld plateau was cool, clothing was necessary and the Shona had

developed an excellent but somewhat laborious spinning and weaving technique.

Conflicts for territories and other reasons caused people to migrate. The winning side would move in and settle some of its people in the new territory. Those from the weaker sides who escaped were also forced to flee to areas of safety and crossed boundaries. In such cases, crossing of stipulated or agreed boundaries became inevitable. The same was also the case with those who were running away from oppressive rule and were forced to cross boundaries and seek refuge in 'foreign' territories. Adepoju (2004) also added that other than political or economic conflicts, some wars were also religion-based in which two cultural or religious groups failed to co-exist leading to fights and resultant mobility as people disperse and flee for their lives. Whether economic, political or religious wars, the consequences were the same - they resulted in movement of people. Apart from wars, religions also played a role in bringing people together or breaking up communities. Bakewell (2007) and de Haas (2007) observed that religious education as well as the Islamic trips to holy places like Mecca also witnessed major migration patterns as pilgrims travelled from all over West Africa, North Africa and East Africa, cutting across many territories on their way.

Bilger and Kraler (2005) write about the 'great migrations' in Southern Africa during the 19th century, citing the Mfecane and the Great Trek. During the Mfecane wars, many people who originally resided in Zululand under King Tshaka fled towards the north crossing territorial boundaries and this saw the groups such as the Ndebeles settling across the Limpopo in present day Matebeleland of Zimbabwe while the Tswana people mostly settled in what is called Botswana today. The Sotho also fled east to find a home in present day Lesotho. Lovejoy (2000) also mentioned the enslavement trade on the continent as another massive wave that led to widespread movement across the continent as the captives were ferried to the coastal areas for exportation while the escapees were running away from vulnerable areas to safer zones. Enslavement caused disruption in local economies, wrecked families and whole communities

through forced displacement supported with brute force of the gun. In the process, identities and languages were lost as communities were fractured and fragmented into oblivion.

What is important to note is that in as much as these migrations involved “cross-ethnic” boundaries, ‘refugees’ were generally welcomed by the host areas and in many cases they even managed to acquire land and own it. This is the reason why, today most of these groups are the rightful owners of the land, which at one time they occupied as ‘refugees’. They managed to fuse into the new communities and stayed in harmony with other groups and even inter-married. However, there were some isolated cases of friction and conflict. For Ikome (2012) and Michalopoulos and Papaioannou (2011), the introduction and imposition of borders upon white occupation remains one of the main causes of conflict and disunity among African nations today. While we take note of this argument, we contend that it is not necessarily the existence of borders that causes conflicts in Africa, rather it is competition for resources that have been made extremely scarce because of (neo-)colonial dispossession and exploitation. Footloose transnational corporations have stolen resources from one African country and then they relocated to another African country together with the stolen resources – this is one of the major causes of conflicts because dispossessed and exploited Africans would be forced to migrate to the countries where the transnational corporations would have moved their resources. While borders have been argued to sow the seeds of division and to have distorted the harmony that used to prevail during the period prior to colonial occupation, we note that it is not necessarily borders that are the culprits – rather it is the transnational corporations’ theft of resources and their subsequent relocation to different jurisdictions. For this reason, while it may be argued that it is calls for African self-determination and nationhood that are divisive, we argue that this is not necessarily the case – in fact, self-determination is a *sine qua non* of African independence and decolonisation – it is central to the contemporary postulations on decoloniality or decolonisation. Loss of African self-determination in fact pushes Africans back into what Frantz Fanon (1963) calls zones of nonbeing.

Post-colonial African Migration Patterns

The advent of colonialism on the African continent marked a turning point in migration within the continent. Although the broad reasons behind mobility still include political, economic and socio-cultural, however, the patterns, flows and contexts are different from pre-colonial ones. According to Bossard (2009), the incursions, by Europeans, into the continent through colonisation witnessed the partition of the continent into dominions for (neo-)imperial dispossession and exploitation. In other words, while Africa is currently made up of 53 sovereign states which are divided by at least 165 borders (Nana-Sinkam, 2000; Ikome, 2012; Bosard, 2009), we contend that the major problem is not the supposed colonial division of the continent into nation states – rather the issue is the colonialists' turning of Africa into (neo-)imperial dominions or backyards for extraction, exploitation and domination.

Colonial administrations altered the motivation and composition of migration by enforcing various draconian and punitive combinations of political and economic arrangements such as several forms of taxes. As a way of keeping their tax base secure, the colonialists introduced boundaries for tax collection purposes. Although these boundaries were meant to restrict indigenous Africans from moving away from the jurisdiction of the colonial governments and localise them for the purposes of looting of tax, we argue here that the key problem is not necessarily the boundaries per se but the taxation purposes for which the boundaries were erected. In this sense, it would be superficial to merely blame the boundaries and lose sight of the (neo-)imperial rationale for setting up colonial boundaries and borders. Once one moved away, it meant that some tax was going to be lost by the colonial administration and hence their solution was to limit movement of the indigenous people. According to Bilger and Kraler (2005) uncontrolled African migration during the colonial period was perceived to be a serious danger to the colonial administration and was deemed to cause widespread damage by disrupting development both to the colony and the colonial master. Thus, while on the one hand colonial administrations promoted labour migration across Africa, they were loath to

uncontrolled African migration. In other words, the major problem here is not the setting up of boundaries and borders, rather it is (neo-)imperial surveillance for purposes of taxation, dispossession and exploitation of Africans. In any case, even in the contemporary era, Africans continue to be *de facto* taxed by (neo-)imperial system that extracts surplus through exploiting Africans and then remitting the surplus to Euro-American jurisdictions.

Other than for tax benefits, borders were also enforced as a way of containing cheap or free labour. If people were allowed to move freely, there were fears that they could escape the jaws of exploitation resulting in a shortage of free labour to work in colonial industrial and farming estates, and negatively affecting their productivity and profits. This makes it clear that borders and boundaries were merely the means for exploiting and dispossessing Africans – so the real problem is not borders and boundaries –rather it is the exploitation and dispossession of Africans. Bilger and Kraler (2005) noted that during colonial Africa, colonial authorities across the continent as a whole deliberately created and adopted policies that ensured that they had an adequate supply of cheap labour. In Southern Africa for example, a legal migration framework ensured that ‘labour migration took the form of oscillating, temporary, circular migration accompanied by specific legal frameworks and state policies (Bilger and Kraler, 2005: 11). They also argued that colonial authorities also made sure that policies deliberately created labour reserves in rural areas by restricting movement and a fair example is how in Southern Africa the rural areas in countries which include South Africa, Northern and Southern Rhodesia, Nyasaland, Lesotho and Swaziland were transformed into labour reserves. Cheap labour would frequently be drawn from these ‘reserves’ to meet the increasing demand of labour in the farming, mining and industrial estates in colonial metropolitan areas across the region. Nshimbi and Fioramonti (2014) noted that the discovery of vast amounts of gold in Witwatersrand during the late 19th century saw reserved labour being drawn from countries such as Mozambique, Botswana, Lesotho, Malawi, Swaziland and Zimbabwe to supply unskilled labour in South African mines.

Bakewell and de Haas (2007) noted that limiting movement was also a way by the colonial administrations of exercising their authority for purposes of dispossessing and exploiting Africans. It can also be argued that restricted movement was also a way of creating employment for colonisers as many got jobs in the police, migration and border patrol departments – in this sense to deborder in the contemporary era results in loss of jobs by Africans employed in the immigration ministries of African nation states. It can also be regarded as a strategy used to contain the indigenous people, control and monitor their activities and thus thwarting the potential of any rebellious activities against colonial regimes. During the liberation wars that brought independence to the continent, guerrillas were normally organised and trained abroad and launched their offensives from across national borders. As a result, it became imperative to tighten movement of people coming into or going out of the country to subdue revolutions.

Such an arrangement that restricted movement across territorial boundaries also had a bearing on the trade pattern on the continent. Cross-border trading was therefore realigned with the new migration policies that were introduced by the colonial rules. As such, in an attempt to curb the free movement of people across borders. A fee associated with moving products beyond national boundaries was put in place to discourage people from international migration and extract revenue from trade to support the colonial regimes. However, in pre-colonial Africa, trade movements were unrestricted as people used to trade freely both among themselves and with those from outside the continents. For instance, Africans freely traded with Arabs, the Portuguese and other early European migrants who came specifically for trade purposes. By welcoming traders of other races, as well as allowing traders from within the continent to trade freely without persecuting ‘outsiders’, it can thus be reasoned that Africans were very hospitable people. Despite the occasional conflicts, they were generally accommodative even to strangers and their communities stayed in harmony with each other. Their hospitality, friendliness, cordiality, warmth and generosity was abused by settlers resulting in their subjugation and conquest (Nhemachena, 2015).

Although the partition of the African continent by Europe disconnected African members of the same families, kinships, clans, “ethnicities”, religions and cultures from each other, we hold that the partition of Africa facilitated dispossession, looting and exploitation of Africans – in other words, colonial borders did not merely disconnect Africans from one another but they served to connect Africans to Euro-American dispossessors, exploiters and looters. Put another way, the aim of colonialists, in setting up borders and boundaries in Africa, was not simplistically to separate African kin groups from one another, rather their aim was to be able to dispossess and exploit the Africans so divided.

The problem in postcolonial Africa is that Africans continue to be dispossessed and exploited even after their governments have changed some migration laws, policies and rules. As evident during the colonial era, the apparent “freedom” that is given to Africans to migrate does not translate to real substantive freedom as in fact immigrants relocate in order to continue working – sometimes as cheap labour – for footloose transnational corporations. Compounding the continued exploitation of African immigrants, immigration laws in parts of postcolonial Africa were drafted to limit entry of ‘foreign’ nationals, mainly from neighbouring Africa countries. The immigration laws restrict employment of non-indigenous workers by giving preference to locals. As unemployment and other socio-economic challenges escalated in most African nations, restrictive immigration laws saw several African governments cracking down on “foreign” nationals who were found without adequate documentation. The so-called “illegal African immigrants” were and continue to be arrested, expelled and deported to their countries of origin. In some extreme cases, there has been Afrophobic violence directed at African “foreign” nationals who were assaulted, killed, had their businesses burnt down and so on.

As a way of reinforcing the restrictions introduced earlier by colonial regimes, independent African governments further enforced passports as a requirement for cross-border migrants. There was also the introduction of visas, work and study permits for foreigners who want to work or study within their different African states. Residence permits and many other permit regimes were also put in place, all in

an effort to limit the movement of African “foreigners”. Adepoju (2005) notes that in Nigeria, non-nationals can only apply for a job after being granted a residence permit. In Senegal, employers are required by law to submit periodical reports about the foreigners under their employ. Such migration laws and regulations put in place to govern entry, residence and employment of foreigners substantially impacted on the traditional free movement of African people across their continent. According to Adepoju (2005: 3), new black governments were “anxious to identify their own national territories as sovereign and independent states” and thus resorted to reducing the inward flow of migrants. While it may be argued that sovereignty and territoriality can be anathema to African integration and work against free movement, we argue that since European Union members retain their sovereignty and territoriality, these concepts are not necessarily problematic for Africa. In fact precolonial African states also had their sovereignty as evidenced by the Shona phrase *mwana washe muranda kumwe* (A Chief’s child can only be a servant in another chieftdom). It was colonialists who destroyed the sovereignty and self-determination of African Chieftdoms, Queendoms and Kingdoms (Nhemachena, 2017; Nhemachena, 2015).

The above notwithstanding, we note the severity of some migration rules and how independent African governments notoriously reinforce the divisions created by colonialism. As Adepoju (2005) noted, in 1967, the Senegalese government expelled many Guineans while Ivory Coast also deported at least 16,000 Beninoise in 1964. Sierra-Leone, Guinea and Ivory Coast also sent back Ghanaian fishermen in 1968 while in 1979 Ghana also expelled Togolese farmers. He also noted that Ghana expelled all illegal persons who did not have valid residence permits as from December 1969 and this operation deported at least an estimated half a million people most of whom were from Nigeria, Upper Volta and Niger. In Southern Africa, Crush and Dodson (2007) noted that post-apartheid South Africa immediately after gaining independence, adopted a ‘detain and deport’ policy towards illegal migrants, and this saw a figure of up to 180 000 deportations annually and between 1999 and 2007, at least 1.5 million people had been deported. These

deportations are unsavoury, vindictive and unAfrican and go against Pan-Africanism, which is discussed in the next sections. This deepens the divisions already created by (neo-)enslavement and (neo-)colonialism. By following this path, Africans are crafting a trajectory of disunity and fragmentation, which disempowers and makes them vulnerable to formidable and united external forces, which lavish and capitalise on this weakness of fragmentation. Afrophobic attacks in South Africa in 2008 and 2015 targeted Black Africans to the chagrin of Africans on the rest of the continent (Nyamnjoh, 2006).

Oloruntoba (2015) sees Pan-Africanism as an ideology that is meant to spearhead the ‘third liberation of Africa’ through promoting indigenous knowledge production as opposed to foreign or exogenous knowledge. According to Adogamhe (2008:7), Pan-Africanism’s main aim and objective is to ‘promote the unity of peoples of African descent in the entire world by seeking to unite Africans in the African continent with the African Diasporas in the other continents’, and by so doing promoting African unity and integration. Radical African leaders such as Kwame Nkrumah supported the idea of a single unified African state (United States of Africa) with a common government. According to Olaosebikan (2011: 221), Nkrumah’s idea of a united African state proposed the establishment of a continental supra-national political institution; the ceding of sovereignty by African states to the supra-national body; the building of an African unified defence system and the harmonisation of all sectors by opening up borders using a single passport and one African currency.

Pan-Africanism is a fight against Western dispossession, domination and the ‘divide and rule’ strategy, which has essentially led to the ‘balkanisation’ of the continent (van Walraven, 1999). It is out of this ideal that the continental body Organisation of African Unity (OAU), later renamed the African Union in 2002 was formed (Okhonmina, 2009; Adogamhe, 2008). A number of other regional bodies whose main agenda is to bring the unity among African nations are: Economic Community of West African States (ECOWAS), Southern African Development Community (SADC), East African Community (EAC), Arab Maghreb Union (AMU) the Economic Community of Central African States (ECCAS); and the

Community of Sahel-Saharan States (CENSAD) were also later formed (Department of Home Affairs, 2017).

Although it has been noted that some African countries have invested more funds towards strengthening migration control institutions, we contend that whatever amounts African countries are spending on migration control cannot be comparable to the amounts that the countries are losing due to transnational corporations' dispossession, tax evasions and exploitation of Africans. In other words, if African countries are to save and retain more funds, then they should rather ensure that transnational corporations pay appropriate taxes, stop dispossessing and exploiting Africans. Put in another way, the challenge for African states, in so far as borders are concerned, is not simplistically about the presence of such boundaries and borders – rather the problem is about the age-old failure by footloose transnational corporations, particularly since independence, to ensure that the proceeds from dispossessing and exploiting Africans remained within African localities and nation states. In other words, the problem is less about opening up African borders than it is about securing African borders so that African states can retain profits and other proceeds from transnational corporations' exploitation of African resources. The problem is also about lack of effective boundaries and borders to enforce, keep or retain taxation on transnational corporation. In other words, transnational capital flight is a problem arising from lack of enforcement of boundaries and borders. If African states deborder, transnational corporations will be the greatest beneficiaries as they will be relieved of the need to pay taxes to the debordered African states and societies. The challenge of capital flight in Africa emanates not from the presence of strict borders and boundaries but from lack of effective borders and boundaries. Pan-Africanism is as much about allowing for the free movement of Africans on the continent as it is about controlling capital flight and the flight of revenue so that they do not leave the nation states' jurisdictions. In other words, if African states do away with their borders, the question is about what will happen to the indigenous African heritages in the context of the predatory world order where Euro-American and other states from

the global north are engaged in the contemporary new scramble for Africa?

Although some might argue that the borders of African nation states are a creation of colonialists and that therefore they need to be destroyed, we argue here that colonialists did not necessarily come to African to create things but to dispossess, exploit Africans and destroy their institutions including their polities. Since colonists did not come to African to create borders but to dispossess, and exploit Africans and destroy institutions that undergirded African sovereignty, we contend that what is needed in the decolonial moment is to claim restoration, restitution and reparations. While some Eurocentric scholars claim that (neo-)colonialists created borders and that therefore Africa needs to deborder as a way to decolonise, we hold that this claim is not sound and that this is not the way to decolonise. The Eurocentric assumption that (neo-)colonialists created borders is inaccurate because what they did was in fact to steal, rob, loot and dispossess Africans and this is what needs to be addressed in the decolonial moment. Pan-Africanism is not simplistically about destroying or deconstructing African borders, rather it is *a fortiori* about reclaiming what (neo-)imperialist stole and looted from the continent – what is within Euro-American borders is not necessarily Euro-American in origin and ownership. In other words, Euro-America did not necessarily create borders in Africa but they locked African property and resources within their Euro-American borders. It is indeed underhand to expect Africa to destroy and deconstruct its borders without at the same time claiming African resources and property that Euro-America is holding in its borders. In order to dispense justice and craft an appropriate Pan-African jurisprudence of migration, it is necessary to do a proper balance sheet to account for what Euro-American colonisers actually destroyed, stole, looted and exploited from Africans [during centuries of enslavement and colonisation] as well as to account for what Eurocentric scholars claim Euro-American (neo-)colonialists have brought to Africa. It is not that Africans owe borders to Euro-Americans, rather Euro-Americans owe Africa for enslavement and (neo-)colonisation and so in the contemporary discourses about

decolonisation, postcolonialism and decoloniality, it is necessary to contextually situate and consider this issue of who owes whom?

Integrating Pan-Africanism into African Migration Policies

The African Union, as a product of Pan-Africanism, has come up with a number of initiatives that seek to advance Pan-Africanism in African migration laws and policies. As the first step towards regional integration, and with the aim of promoting free or at least less restrictions in cross-border migration, the continental body recognises eight regional economic communities (RECs) earmarked to spearhead the development of the continent (African Union, 2012). To achieve integration, the AU encourages member states to 'gradually remove, among themselves, obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment' (Paragraph 2(i) Article 4, Abuja Treaty quoted in Nshimbi and Fioramonti, 2014). Accordingly, the ambition is for Africa to be an Economic Community by 2028 – but of course in the absence of the indigenisation of African economies, Africa risks simply becoming a community for existing Euro-America economies. Again as provided in Article 6(e) of the Abuja Treaty, the AU strives to create an African Common Market (ACM), which will facilitate free movement of persons and the rights of residence and establishment. Article 71(e) also encourages AU member states to work together in areas of development, planning and employing human resources by crafting employment and labour policies, which do not prohibit free movement of people within the Community.

The AU has also come up with a Migration Policy Framework for Africa (MPFA) and the African Common Position on Migration and Development (ACPMMD) in which it emphasises its approach to migration in Africa (African Union, 2006a) which recognises the important role of migration in fostering development and thus encourages AU states to develop policies that promote migration for continental development. Although the framework is not legally binding, it still remains a crucial document with a lot of potential in promoting favourable and less restrictive migration laws and policies among member states (Nshimbi and Fioramonti, 2014). The AU

facilitated the formation of regional blocs, which include COMESA, ECOWAS, SADC and EAC among others as a response to the Pan-Africanist call to integrate and unify Africa. Member states of these blocs have agreed to create a Tripartite Free Trade Area (TFTA), which comprises of three RECs during the 2008 COMESA-ECA-SADC Tripartite (CEST) Summit hosted by Uganda. It was agreed to harmonise trading arrangements among members, including the free movement of people within the RECs as a way of fostering cooperation, integration and enhancing cordial relations among member states, with the overarching aim of developing Africa. All migration resolutions adopted by regional blocs resonate with AU resolutions and promote free movement within member states. Just like the AU, the SADC Treaty, for example, advocates for elimination of ‘obstacles to the free movement of labour and of the people of the Region generally, among Member States’ (SADC, 1992: 6). The ambitions of fostering unity and integration is evident in the AU and REC documents. The only problem is in lukewarm implementation, which is not good for Africa’s development. New and fresh impetus is necessary to drive these important processes of integration.

The SADC Protocol on Free Trade of 1996 was also put in place to reduce trade restrictions and promote free trade between member states. The SADC Protocol on Tourism promotes tourism-related movement across the region while the SADC Protocol on Education and Training promotes free movement of students and academic staff within the region for studying, teaching and research (Article 3(a)). Nshimbi and Fioramonti (2014) noted that South African higher learning institutions prioritise SADC citizens when admitting foreigners to Higher Education institutions. Although the country was in recent years notorious for deportations, having occupied the pole position globally (Nshimbi and Fioramonti, 2014), it has since reformed and adopted a friendlier approach towards immigrants especially from within the region. Nshimbi and Fioramonti (2014) pointed out that SADC citizens constitute the biggest proportion of foreign students in South Africa and benefit from a ‘special dispensation for SADC students’ which charges them lower fees than other international students who come from outside the region. However, Department of Home Affairs (2017) notes that the SADC

region is still lagging behind other Regional Economic Communities (REC) when it comes to implementing the regional migration policy frameworks to promote freer movement of persons within the region when compared to other regions. The ECOWAS bloc adopted the Protocol on Free Movement of Persons, Residence and Establishment which permits citizens of member countries the right to enter, reside and establish themselves anywhere within the region, way back in 1979 and the bloc continues to seek to 'recreate a borderless West Africa' where citizens can move freely (Adepoju 2013:7). The EAC is also ahead of the SADC as it has implemented visa-free movement of EAC citizens, although it is still to implement free residence and establishment. The bloc has also started working on reducing requirements and fees for its citizens applying for temporary and permanent residence (Department of Home Affairs, 2017). These measures are important as they decriminalise migration, which is a normal process with a huge historical footprint across the continent.

South Africa as the main economy has been commended for its effort towards easing migration despite receiving loads of foreign visitors on daily basis. In 2011, the Department of Home Affairs undertook a regulation exercise, which saw undocumented immigrants being made legal through the issuance of special residence/work permits as opposed to deportations. The exercise saw Zimbabweans who had entered the country illegally receiving the bulk of all the free permits issued. Other illegal migrants included citizens from Democratic Republic of Congo, Angola, Malawi and Lesotho (Department of Home Affairs, 2011). The department has also started offering 10-year multiple entry permits to immigrants from other African countries who require visas to visit South Africa; particularly those who frequently travel such as business people and academics (Department of Home Affairs, 2017).

The AU has for long been trying to incorporate Pan-Africanism and its latest attempt is to introduce an AU visa-free passport, which is intended to be issued to citizens of member-states. Holders of this passport will then freely travel to any African country of their choice without facing any restrictions, as is the current situation. The AU seeks to have all visa requirements for intra-African movement

waived by 2018 and to put in place a legal framework for the issuance of African Common Passport by year 2023 (AU, 2015).

‘*African Union Agenda 2063*’ is an action plan document, which provides a framework for Africa’s development from 2014 to 2063. In this document, the AU also proposes to introduce the African Passport as a way of promoting free movement of people. The continental body also plans to transform Africa’s laws, which are generally prohibitive to the movement of people within the continent. It is also the body’s wish to bring down borders and enhance free movement of all African citizens in all African countries by the year 2018. It also plans to implement programmes and projects such as the Integrated High Speed Train Network and creation of a Continental Free Trade Area on the path to integration. These initiatives will help to do away with some restrictive migration laws and hence promote freer movement across the continent (AU, 2015).

It is anticipated that if these efforts are successful, then the Pan-Africanist dream of a united African society with freer movement and less restrictive migration and trade laws for the betterment of Africans will be realised. The adoption of homegrown measures and initiatives will propel the continents on a new pathway, which begins with abandoning foreign-generated policies, which have proved to be ineffective in dealing with African challenges. The initial steps towards African unity should be promoting free movement of people, goods and services as it was in pre-colonial times. Hence, the abolition of restrictive migration and trade laws is imperative and vital.

Conclusion

In the light of the foregoing, we argue that a Pan-Africanist jurisprudential theory of migration requires Africans to be wary about the contemporary exhortations for the continent to be open, because the openness that Eurocentric scholarship is urging replicates colonial assumptions about the supposed emptiness and openness of Africa. In fact, openness effectively translates to vulnerability of Africans particularly in a world full of vulture-states that seek to loot and exploit African resources. The notion of inclusiveness needs to

be qualified also. While a Pan-Africanist jurisprudential theory of migration takes note of constitutional provisions on the freedom of movement, it also argues that Africans do not only need the freedom of movement that is not accompanied by restitution and restoration. In a global context where transnational corporations are footloose, the freedom of movement for Africans effectively entails their freedoms to migrate following the footloose transnational corporations that supposedly provide them with jobs but often at cheap labour rates. In this sense, freedom of movement translates to freedom to pursue transnational corporation exploiters that retain the privilege to comb the world and also to recruit cheap labour power from anywhere in the world. In contrast to precolonial African migration when Africans moved in pursuit of their own commercial or trading activities for example, contemporary African migration is in pursuit of employment by exploitative footloose transnational corporations. In this regard, freedom of movement entails the freedom to seek bondage in transnational corporations' factories located in different places in the world. We therefore argue that freedom of movement needs to be preceded by restitution, reparations and restoration in order for the right to freedom of movement to be meaningful. Otherwise, freedom of movement has effectively meant Africans freedom to pursue bondage with their (neo-)imperial masters who are seeking to efface Pan-Africanism and African nation states. Africans need to exercise their sovereignty and autonomy even in migration across the continent. The problem is not that Euro-America has constructed borders around African states rather the problem is that Euro-America is enclosing and locking African resources and properties within Euro-American states – this is the problem which needs to be prioritised in this decolonial moment. An African jurisprudence of migration needs to take cognisance of this important aspect.

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African Law in Comparative Law: A Case of Undermining African Jurisprudence and Promoting a New World Order Agenda?

Tapiwa V. Warikandwa & Samuel K. Amoo

Lawyers are the first to proclaim that the imposition of colonial rule on the various African territories had a profound effect on existing legal orders in Africa. However, the slow-moving train of African legal history did not even stop to take colonial baggage. Like a band of marauders, colonialists imposed their concepts onto existing structures, claiming overall control, but the train kept moving and did not change its basic characteristics as much as the literature has claimed (Werner F. Menski, 2005).

Introduction

Jurisprudence has generally been accepted as a specialized branch of social science through which the study and philosophy theory of law are pursued (Gardner, 1961; Stuart, 1863). Through jurisprudence, jurists (scholars and philosophers of jurisprudence or legal theorists) seek to obtain a deeper understanding of legal reasoning, of legal institutions, of the social science of law, and legal systems. Modern jurisprudence, which began in the 18th Century, has primarily focused on principles of natural law, civil law and the law of nations (Garner, 2009). Jurisprudence is generally divided into categories based on the type of questions scholars seek to answer and by theories of jurisprudence, or schools of thought, regarding how those questions can be best addressed.

The contemporary philosophy of law, which deals with general jurisprudence, addresses problems internal to law and legal systems, and problems of law as a particular social institution as law relates to the larger political and social situation in which it exists (Govekar, 1958; Hart, 1958: 593). The term jurisprudence emanates from the

Latin word *jurisprudential* (Govekar, 1958). Juris is the genitive form of *jus* (“law”), and *prudential* (“prudence”) (Ibid). The term “prudence” or discretion, foresight, forethought, circumspection, refers to the exercise of good judgement, common sense, and even caution, especially in the conduct of practical matters (Ibid). However, regardless of the above outlined context of jurisprudence and its purposes, African law remains one of the considerably least studied and under-utilised legal systems in the world. Western legal systems have received greater preference with African law being regarded as being too broad and incapable of codification and uniform application. In most instances, the application of African law must be subject to its conformity with western common law, *which is not so common anyway* (Ndulo, 2011: 187).

There is scarcely any rigorous scholarship on African law that has been undertaken by African scholars, or institutions, as is the case with other legal systems such as English common law and Islamic law, just to name a few. Rather, African law has been studied purely within the context of comparative law. Studying African law within the context of comparative law raises numerous fundamental issues that need to be clarified (Okeke, 2011; Okeke, 2015). For example, it is repeatedly suggested that there are as many distinct legal systems as there are countries in Africa. This argument is flawed as Africa has more applicable laws (though customary law) than countries (Okeke, 2011; Ndulo, 2011). Another disturbing issue emanates from the approach of discussing the viability of African law within the context of comparative law. Such an approach leaves questions as to whether the examination of the African legal system should be done in each country or for the entire continent collectively. It is evident that such an approach will not bear much fruit but might turn out to be an ineffective exercise due to the diversity of laws, specifically customary law and the traditions of each community in a particular African country. For example, Nigeria has over 250 ethnic groups, each with its own unique customary laws (Oba, 1998: 38). As a result, national laws are applied in towns whereas customary law’s application is relegated to the rural areas, especially in matters of a personal nature (Wicomb & Smith, 2011).

Further complexities relating to the use of comparative law as the basis for studying African law emanate from countries whose political designation remains contentious. For example, in studying contemporary African law within the context of comparative law, questions have to be raised as to whether countries such as Morocco, Libya, Algeria, Tunisia and Egypt are justifiably African or simply Arab States in Africa. These issues are crucial to understanding African law in its traditionalist nature as comparative law largely presents itself as a New World Order initiative aimed at diluting and/or undermining African legal norms/value systems. In the 20th century several politicians, such as Woodrow Wilson and Winston Churchill, used the term “new world order” to refer to a new period of history characterised by a dramatic change in world political thought and in the balance of power after World War I and World War II (Kissinger, 2014). They all saw the period as an opportunity to implement idealistic proposals for global governance in the unsubstantiated sense of new collective efforts to address worldwide problems that allegedly go beyond the capacity of individual nation-states to solve, while always respecting the right of nations to self-determination. These proposals led to the formation of international organizations (such as the United Nations in 1945 and North Atlantic Treaty Organisation in 1949), and international regimes (such as the Bretton Woods system (1944-1971) and the General Agreement on Tariffs and Trade (GATT, 1947-1994)), which were calculated both to maintain a balance of power in favour of the United States and to regularize cooperation between nations, in order to achieve a peaceful phase of capitalism (Ibid). These creations in particular and liberal internationalism in general, however, were regularly criticised and opposed by American paleo-conservative business nationalists from the 1930s onwards (Buchanan, 1999).

Progressives welcomed these new international organizations and regimes in the aftermath of the two World Wars, but argued that they suffered from a democratic deficit and were therefore inadequate not only to prevent another global war but also to foster global justice. The United Nations was designed in 1945 by United States of America bankers and State Department planners, and was always intended to remain a free association of sovereign nation-

states, not a transition to democratic world government. Thus, activists around the globe formed a world federalist movement, hoping in vain to create a “real” “new world order” (Jackson, 2012).

Wells, a British writer and futurist, went further than progressives did in the 1940s, by appropriating and redefining the term “new world order” as a synonym for the establishment of a technocratic world state and of a planned economy (Wells, 2006). Despite the popularity of his ideas in some state-socialist circles, Wells failed to exert a deeper and more lasting influence because he was unable to concentrate his energies on a direct appeal to the intelligentsias who would ultimately have to coordinate a Wellsian new world order (Wagar, 1977). It is therefore imperative that in discussing African law in the context of Comparative law, reference must be made to the historical layering, in addition to the geographical splintering resulting from colonialism (Okeke, 2011). Historically, the *Francophone versus Anglophone* African legal backgrounds attempt not only to address globalization, but also to create Business and Securities Law (Ibid). Often it is difficult to determine what models African nations have implemented, a development, which signifies their inability to decolonize their legal systems.

It is therefore irrefutable that Africa has a makeshift legal system characterised by a combination of religious, civil, western common law and traditional legal traditions. Many of these combinations do not stem from voluntary development of African legal systems; rather they are influenced by domineering colonial powers. The existing systems are delicately balanced, often consisting of conflicting laws, and requiring that a balance and common ground be found between traditional systems, and the colonially imposed western systems (Okeke, 2011). While using comparative law in the United States of America or European countries may have both scientific goals, for example, understanding their own and other legal systems, as well as practical goals (knowing how to interact legally with the greater global or regional whole), the same cannot be said of Africa. The reliance on foreign legal systems by African countries has undermined African legal systems and led to a loss of identity in most African societies (Joireman, 2001). Thus, colonisation persists as the legal systems in operation continue to favour western countries

(Mancuso, 2008). While some scholars argue that comparativism has worth in Africa and thus modern African nations should use it as a means to an end (Kamba, 1974, Okeke, 2011), this is not entirely accurate. This chapter will therefore critically analyse the role of comparative law in undermining African law as part of the New World Order agenda. This argument is premised on the ideology informing the term “law fare”. Lawfare is a form of disproportionate warfare characterised by the use of a legal system against an enemy to the extent of damaging or delegitimising them. The use of the term “lawfare” was introduced in reference to the Western legal system’s overly contentious and utilitarian nature as opposed to the humanitarian, norm-based Eastern system (Smith & Crossley, 1975), and *indeed the people centred African Customary law underlined by an Ubuntu philosophy*. Colonel Charles Dunlap describes lawfare as, “a method of warfare where law is used as a means of realising a military objective” (Dunlap, 2001). Further, Dunlap posits that lawfare is a “cynical manipulation of the rule of law and the humanitarian values it represents” (Ibid). His arguments are consistent with those of Wittes who plausibly argued that, “The name lawfare refers ... to the use of law as a weapon of conflict...” (Wittes, 2013). Lawfare is exclusively negative hence the justifiable observation that it refers to the *abuse* of western laws and judicial systems to achieve strategic military or political ends in Africa. This assertion is affirmed by the 2010 speech of the Lawfare Project Director, Brooke Goldstein who stated that:

... lawfare is about more than just delegitimising a state’s right to defend itself; it is about the abuse of the law and our judicial systems to undermine the very principles they stand for: the rule of law, the sanctity of innocent human life, and the right to free speech. Lawfare is not something in which persons engage in the pursuit of justice; it is a negative undertaking and must be defined as such to have any real meaning. Otherwise, we risk diluting the phenomenon and feeding the inability to distinguish between what is the correct application of the law, on the one hand, and what is lawfare, on the other. Because that is the essence of the issue here, how do we distinguish between that which constitutes a constructive, legitimate legal battle (even if the legal battle is against us and inconvenient) from that which is a

counterproductive perversion of the law, which should be allocated no precedent? The delineation is not as simple as some may like to make it; that is lawsuits against terrorists are good, and legal actions against the United States and Israel are bad. Now, the question is not “who is the target”, but “what is the intention” behind the legal action: is it to pursue justice, to apply the law in the interests of freedom and democracy, or is the intent to undermine the system of laws being manipulated? (Goldstein, 2010).

It is therefore not surprising that the use of comparative law in the domestic judicial system of developed countries such as the United States of America is regularly disapproved of. It is surprising that given African countries’ historical backgrounds they rush to employ a patchwork of principles of comparative law, in the name of synthesizing their supposedly multi-faceted, post-colonial legal systems. Africans have employed comparative for purposes of supposedly attempting to improve, systematize and refine their legal systems. However, this chapter will prove that comparative law plays no other role than weakening African law and ushering in the New World Order (Wambugu, 2018). The significance of comparative law in Africa will accordingly be critiqued as well as the teaching of the subject in law faculties in African universities. Comparativism of African Law in the context of comparative law is a cancer to the African legal education and a direct affront to the continent’s efforts to decolonize.

A Brief History of Comparative Law

Comparative law refers to the intrinsic study of *similarities* and *dissimilarities of the laws prevailing* in different countries (Kamba, 1974). In particular, it is understood as the study of different legal systems in the world, including but not limited to civil law, common law, socialist law, Chinese law, Jewish Law, Hindu law and Islamic law, amongst others (Ibid). The definition of comparative law extends to the analysis and description of foreign legal systems even if a substantial comparison is not conducted (Ibid). In the contemporary global era driven by neoliberal economic policies, processes such as

economic integration, democratisation and internationalism have significantly accelerated reliance on comparative law by legal academics, judges, law students and legal practitioners (Ibid). Comparative law does not constitute a distinct branch of national law. It does not comprise normative prescriptions for the regulation of human conduct and relationships and has no rules or principles (Kahn-Freund, 1966: 40, 41; Gutteridge, 1949). The systematic use of the comparative method does not result in legal norms.

Contemporary comparative law is said to have originated from Europe around the 18th century (Butler, 2008). Even though legal scholars practiced comparative methodologies before the 18th century, it is largely accepted that 18th century Europe provided the foundation of modern comparative law. French jurist and philosopher, Montesquieu, has largely been considered as the founding figure of modern comparative law (De Montesquieu, 1949). Montesquieu argued that:

[T]he political and civil laws of each nation ... should suit those of other nations. They should be in relation to the nature and principle of each government: whether they form it, as may be said of politic laws; or whether they support it, as in the case of civil institutions. They should be in relation to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives, whether husbandmen, huntsmen, or shepherds: they should have relation to the degree of liberty which the constitution will bear; to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs (Ibid).

Montesquieu's reasoning suits the ideals of a New World Order in which the United Nations and its agencies formulate laws and policies, which are universally applicable. It must however be questioned as to how a common application of standards can be realised in a largely diverse world with millions of cultural and/or ethnic groupings. Julius Nyerere the late former president of Tanzania argued that there is no room for the universal application of standards because countries of the world are at significantly different levels of development (Nyerere, 1999; Warikandwa &

Osode, 2017: 51). Further, with different cultural value systems and norms existing in the world, the practicality of a uniform set of legal rules being enforced the world over must be questioned. Obviously, the laws of smaller states will be abrogated and replaced by those of the so-called civilized nations. Sir Henry James Sumner Maine, British jurist and first professor of comparative law at Oxford observed that:

As the civil laws depend on the political institutions, because they are made for the same society, whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law (Cooks, 2004: 34).

The fundamental role of comparative law in the view of philosophers and jurists such as Sir Henry Maine was to bring the laws of uncivilized nations (developing countries) up to speed with those of civilized nations (western countries) (Maine, 1906). From Maine's arguments, it can be concluded that comparative law has a more sinister agenda than presented on the face of it. The next section of this chapter will seek to expose the hidden agenda of comparative law in the modern society.

Comparative Law in Africa: A Weapon for Enlarging the Colonial Expansionist Agenda?

In the contemporary African society and in modern law schools, comparative law has in the main been embraced as a mechanism for studying separate legal systems in the world (Okeke, 2011). The unique legal systems existing in the world, including those in Africa, are supposedly examined with due regard to their specific constitutive elements (Kamba, 1974). Emphasis in this regard is placed on how the legal systems differ and how their elements can be combined into a solitary legal system (Ibid). As a result, a number of legal disciplines have developed as separate branches of comparative law, including comparative civil law (for example the law of delict, contract and obligations), comparative criminal law, comparative

commercial law (for example international trade law and the law of association), comparative administrative law, and comparative constitutional law. It therefore is evident that the key objectives of modern comparative law are:

1. To harmonise and/or unify legal systems at a multilateral or global level or contribute to the realisation of perfected and uniform or synthesized legal systems, at local, national and international spheres of governance; and
2. To supposedly obtain an “intrinsic” understanding of the different legal systems in the world in effect.

It therefore is not in doubt that the central objective of comparative law is to realise the unification of different legal systems in the world; in the process realising a one-world government. This perception is consistent with the views of Kamba who plausibly observed that comparative law’s purpose goes beyond mere academic or theoretical preoccupation (Kamba, 1974). As a matter of fact, comparative law differs from and transcends the general scope of jurisprudence (*For a detailed study of the difference between comparative law and jurisprudence see Samuel, 1998*). Comparative law is considered as a fundamental legal tool for informing other legal disciplines, including jurisprudence, of normativity (Tourkochoriti, 2017). Normativity is a phenomenon in human societies, which determines specified human actions or outcomes as being desirable or undesirable (Ibid). A norm for purposes of normativity is considered as an acceptable standard for evaluating or making judgements about behaviour or outcomes (Ibid). In the legal field, normativity describes the manner in which something has to be done. For example, from an African perspective, third party claims on adultery are permissible as a mechanism of maintaining morality. From a western perspective, third party claims on adultery are not legally enforceable in the contemporary society as they are arguably “outdated”. Comparative law as a central component of normativity thus poses significant challenges to the growth and development of Africa law, which is generally regarded as the law of uncivilized nations (Basdeo, 2013; Okeke, 2015).

Comparative law is also regarded as a concept, which offers insights into the concept of legal transplants. A Scottish-American legal scholar called Allan Watson (Watson, 1974) introduced the concept of legal transplants. The concept of legal transplantation is diffusion-centred. This implies that changes in legal systems take place due to one country adopting or borrowing from another. In principle, changes in legal systems in Africa take place through the movement of “civilized legal systems” from a zone of higher concentration (Western countries) to a zone of hypothetical lower concentration (Africa which is regarded as having “uncivilized legal systems” characterised as Customary law). Watson argued that transplantation is arguably the “most fertile source” of legal development (Watson, 1974). This serves as reason why laws in Africa are commonly influenced by western foreign policies and experiences through the broader process of diffusion of law. The diffusion of law is also called “legal acculturation”. “Acculturation” refers to the psychological changes induced by cross-cultural imitation (Lakey, 2003; Zaharna, 1989). Such cross-cultural imitation defines cultural dilution in Africa, which is driven by the imperialist agenda called globalization.

It is therefore not surprising that McDougal branded comparative law, “a literature that is voluminous, obsessively repetitious and sterile...” (McDougal, 1952). However, it is submitted that the method of comparison remains an integral part of thinking and knowing and thus should be embraced to the extent that it does not carry any ulterior motives (Rheinstein, 1952), as is the case with modern comparative law. The next section provides a broader analysis of the functions of comparative law in Africa.

Comparative Law and its Functions in Africa: A Landmine Undetected?

Comparative law plays a central role in national judicial processes (Kamba, 1974; Okeke, 2011). Knowledge of the law and practice of foreign courts has often been relied upon in African courts to suggest preferable solutions to legal problems encountered in a specific society. Little regard has been given to the societal context within

which such foreign law is imported to supposedly remedy societal ills. For example, there have been recent cases in Namibia, Zimbabwe and South Africa in which it had to be decided whether third party claims for adultery are still an acceptable legal norm in contemporary African societies. African societies recognise third party claims for adultery (*Mangole v Rapuleng* 1990 BLR 450 (HC)). It is no wonder that in the Zimbabwean case of *Timothy Chinyadza v Melton Phiri* HH 76-09 at page 4, Kudya J defined *contumelia* as follows: “*Contumelia* is equated to the injury, hurt, insult and indignity inflicted upon a plaintiff by adultery committed by a defendant with his or her spouse”. One does not require a magnifying glass to scrutinize and come up with a conclusion that *contumelia*, that is injury, hurt, insult and indignity occurs, to an innocent spouse where the other commits adultery. The injury is so obvious that there would be no justification in not seeking legal redress for the wrongful hurt occasioned.

Strangely, in the case of *RH v DE* (Case No: 594/2013) the South African Supreme Court of Appeal found that delictual action based on adultery of the innocent spouse has become outdated and can no longer be sustained. A similar decision was recently arrived at in the Namibia case of *Van Straten v Bekker* (16056-2014) (2016). In principle, adultery is no longer actionable at law (adulterers are not legally liable for their immoral conduct). In the case of *DE v RH* (CCT 182/14) [2015] ZACC 18, De Villiers CJ pronounced that the criminal offence of adultery had been abrogated by disuse. The same sentiments were echoed by Kentridge AJ (as he then was) in *Duplessis and Others v Deklerk and Another* [1966] ZACC 10, 1996 (3) SA 850 quoting *R v Salituro* (1992) 8 C.R.R. 2nd 173 when he remarked that:

Judges can and should adapt the common law to reflect the changing, social moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared ...

It is pertinent to question which processes the South African judges followed to determine that third party claims for adultery are outdated in a country where customary law remains fundamental. Clearly courts have a duty to develop the common law whenever it is

warranted and in conformity with the interests of justice. However, it is also common knowledge that public policy is now infused with constitutional values and norms. It is apparent public policy often represents the legal convictions of the community and reflects those values that are held dearly by a society. To that extent therefore, in deciding whether a delictual claim for adultery damages is outdated or otherwise, while appreciating and respecting foreign jurisdictions' decisions, the decision should be contextualised to reflect the legal convictions and societal values of the African society. African countries' moral fabric is engraved in the each country's culture, religion and traditional values. Any development of the common law therefore ought to be underpinned on the interests of justice, and of course, in conformity with the Constitution. The institution of marriage is entrenched deeply in African countries' culture, tradition and religion and its protection has been in unambiguous language propagated by the courts (See *Katsumbe v Buyanga* 1991 (2) ZLR 256 and *Mapuranga v Mungate* 1997 (1) ZLR 64). In both cases, the courts frowned upon the wrongfulness of adultery in so far as it is a threat to the marriage institution. Malaba J (as he then was) in the *Mungate* case held, "Adultery is still prohibited by public opinion as an act of sexual incontinence."

Given that Constitutions in Africa are people driven and recognise African Customary law, which in turn regards marriage as sacred, it can be concluded that the marriage institution has a public complexion. African countries have a duty to protect the marriage institution and obviously, third parties encroaching into a marriage are also part of the nation. In the case of *DE v RH* (*supra*), the court largely proceeded on the premise that the import of the delict is to restore a marriage or to prop it up. From an African Customary Law perspective, this is not the consideration and thus the court misdirected itself. This marks a point of departure. The point which must be made is that the import of the delict in the interest of protection of the marriage institution is also of constitutional interest or national interest given the values under which African constitutions are underpinned (*Njodzi v Matione* (HC 11253/14, HH 37-16) [2016] ZWHHC 37 (14 January 2016)). Adultery damages are

to compensate the innocent party to a marriage for their loss of consortium and *contumelia*.

When an award for damages for adultery is made, the innocent party is not precluded from suing for divorce or condoning the wrong by the other spouse and forging ahead with the marriage (Ibid). It is accepted marriage and family are social institutions of vital importance in the African culture. They have more than personal significance, as shown by the constitutional protection of the morally underpinned relationship. Constitutions would not seek to protect the marriage institution if the duty for the sustenance of the institution was wholly for the parties, at least in the African context, given the importance placed by society on the marriage institution. The argument that the delict brings about indignity on the third party and that it infringes on the rights of the third party cannot be sustained when from the perspective of its invasion of the marriage institution (Ibid). The marriage institution is protected by the society and the nation in national Constitutions. In circumstances where a third party is prepared to violate the marriage institution, they cannot be seen to complain of their dignity being impaired when they would have violated the very institution they vowed to protect through the constitutional values (Ibid). The invasion of a marriage by a third party in the African context is an attack on the dignity of the innocent party. The dignity of the adulterer ought not to be more important than that of an innocent party to a marriage.

The dignity and right to privacy of all citizens is not absolute. It is made abundantly clear that rights, as given in any Constitution have to be responsibly enjoyed. Everyone has the duty to respect the fundamental human rights and freedoms as entrenched in any constitution. In *casu*, the defendant has rights to dignity, privacy and equality before the law, which are the same rights the plaintiff has (Ibid). What remains is the balancing act on whether there is an intrusion on the other's rights, which would require the delictual sanction. The remarks and sentiments by Honourable Robinson J in *Katsumbe v Buyanga supra* still hold true today. Robinson J remarked:

Hopefully, we have not reached the stage where we have to be told adultery is not something to be eschewed and condemned. Accordingly, unless they are

prepared to take a strong and principled stand in this regard in support of the vital institution of marriage, the court will only be party to society's further slide down the slippery slope to the unlicensed promiscuity which scoffs at the spiritual prohibitions against premarital and extra marital sex and which has landed the world in the sexual moral over which monsters, AIDS, now presides in all its frightening aspects (See also the case of *Elizabeth Tanyanyiwa v Lindine Huchu* HH 668-14).

It must be remembered that marriage and family remains the basic structure of our African society, the preservation of which squarely lies on the couple and African countries as per our traditional norms and values as set out in national constitutions. The third party who, with knowledge, intrudes into the marriage institution ought to compensate the innocent spouse for the injury occasioned. It is understood, adultery is usually debilitating for the victimised spouse who suffers indignity and hurt because of the adultery. The importance of the marriage and family social institutions cannot be underplayed, more so given that the relationship is not only significant to the individuals concerned but also for the public at large. Marriage is a human institution, which is regulated by law and protected by many constitutions in Africa, which, in turn creates genuine legal duties. In the case of *Dawood and Another v Minister of Home Affairs and Others*, *Sbalabi and Another v Minister of Home Affairs and Others*, *Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8; 2000(3) SA 936 (OC); 2000(8) BCLR 837 (CC)), the court therein alluded to the importance of marriage and family institution, and O'Regan J had this to say;

Marriage and family are social institutions of vital importance. Entering into and sustaining a marriage is a matter of intense private significance to the parties...Such relationships are of profound, significance to the individuals concerned. But such relationships have more than personal significance, at least in part because human beings are social beings whose humanity is expressed through their relationships with others. Entering into marriage therefore is to enter into a relationship that has public significance as well ...

It can clearly be deduced therefore, that a marriage institution, has both the private and public complexion, hence the need for its protection (*Njodzi v Matione supra*). Third party claims for adultery are therefore not outdated. Any deliberate intrusion into the marriage institution is an attack on the dignity of an innocent spouse, which ought to be sanctioned by the law. The *boni mores* or legal convictions of our African society have not changed so much that adultery could objectively be regarded as reasonable and thus it remains unlawful (Carnelley, 2013). The legal and public policy in Africa are still reflective of adultery as wrongful. This is more so given Africa's customary as well as religious values and traditions, which are inclined towards protection of the marriage and family institution (Kyalo, 2012).

The marriage institution in Africa is founded upon morals (Magesa, 1997; Phiri, 2011; Kayongo-Male & Onyango, 1984; Kilbride & Kilbride, 1993). As such, a constitution in Africa, as the supreme law of the country, ought to protect marriage as a morally underpinned relationship. Intrusion in the marriage institution by adultery therefore remains wrongful and there is nothing outdated about it (*Njodzi v Matione supra*). The abolishing of third party claims for adultery illustrates the dangers of judges relying on comparative law to arrive at decisions which do not reflect the religious and cultural norms of African societies. Instead, they rely upon decisions in other jurisdictions to unjustifiably and/or erroneously acculturate African people to western value systems. Such practices should be frowned upon by African societies.

Understanding Comparative Law in Africa

To analyse comparative law in Africa, one has to begin with understanding what purposes are fulfilled through the study of that law. Several comparative legal scholars concur that comparative law is the combination of studying jurisprudence and legal history, and the intellectual task of studying the relationships between systems of law (Danneman, 2006; Valcke, 2004). One common objective is informational maintenance of different rules of law relating to different States. This allows comparative legal scholars to track the

development of regional laws and the development of systems of law (Kamba, 1974). The negative impact of this approach is that international law scholars tend to gauge African laws' effectiveness based on African governments' ability to implement western oriented public and private international law in their jurisdictions. As such, African laws always have to be transformed in conformity with western laws (Ndulo, 2011). Does this signify that African legal systems have nothing valuable, which the western legal systems can embrace? The approach implicit in comparative law in Africa is that of acculturation aimed at enlarging the space of imperialism in African societies.

It is therefore important to observe that before one analyses the purpose of comparative law in Africa, such individual must define the nomenclature and system of study to be employed (Okeke, 2011). As a basis of comparative study, one has to categorize regions such as the United Kingdom and the United States of America. It is relatively easy to categorise the United Kingdom and the United States of America into regions for a comparative study of their legal systems (Ibid). The reason for this is that whilst the aforementioned regions may have unique law in individual territories, the overall system of law is similar and uniform (Ibid). This is not the case with Africa, which is comprised, of more than fifty-four governments having diverse and unique cultures and systems of law. It is therefore problematic and unrealistic, to take Africa as one region and compare it to the United Kingdom. Africa's continental diversity is significantly pronounced such that undertaking a comparative study of its legal systems with those of a western country would be excessively general, and thus unproductive (Ibid).

The supposed benefits of comparative law to Africa are thus significantly questioned. Comparative law jurist Taslim Olawale Elias, a former Judge of the Nigerian Supreme Court, and the International Court of Justice, once argued that if an African country desired to develop a more complete legal system, it had to reform its legal systems (Elias, 1975; Okeke, 2011). Judge Elias attached the development of Nigeria's legal system to its ability to modernise (import western "civilised laws"). Judge Elias thought comparative legal studies could enhance communication between people having

fundamentally different methods of thinking about law and order (Okeke, 2011). What Judge Elias overlooked is that modernisation is advanced by the modernisation theory (Matunhu, 2011). The theory defines modernisation as a model of progressive transition from a “pre-modern” or “traditional” to a “modern” society (Ola, 2015; Beck *et al*, 2003). The modernisation theory was advanced from the ideas of German sociologist, Max Weber (Derman, 2012; Tsai, 2016). Emphasis in the modernisation theory is placed on the role of rationality and irrationality in the transition from traditional to modern society (Schmidt, 2015). Social Darwinism provides a basis for determining the evolution of human societies (Plotkin, 2011).

The idea at the end of modernisation is to ensure the integration of the economy, political and social cultures (Matunhu, 2011; Weber, 1988; Wallerstein, 1987; Wallerstein, 1977). This process of integration is understood to be an act of spreading modernisation across borders (Arjun, 1997). As proposed by Harvard sociologist Talcott Parsons, “traditional” countries, such as African countries, can be brought to development in the same manner developed countries have been (Agugua, 2017). Developed countries industrialised through a raft of inhumane business practices such as slave labour and cheap labour (Harley, 2011). They disregarded the rights of African indigenes and stole their land and natural resources, a practice, which continues unabated today. The same countries have undermined African value systems such as Ubuntu. Ubuntu means “humanity towards others” (Earls, 2009). It is a philosophy that espouses a belief in the universal bond of sharing that connects all humanity (Hailey, 2008). Ubuntu as a principle of African customary law has been rejected as a jurisprudence theory. In principle, it cannot be regarded as a civilised concept of law. As such, as part of the modernisation process, Ubuntu, which seeks to ensure a collective sharing of obligations and responsibilities, has been supplanted by the individualistic western imperialist theories of modernisation. What therefore is civilised about self-centeredness? What is civilised about immoral practices such as adultery, which western legal systems condone? Comparative law is a ticking time bomb waiting to explode in the African society.

Africa must develop its legal systems in an African way. To develop their legal systems, African countries must unite into cohesive groups and formulate legal systems, which talk to their social context and help them decolonise their legal regimes. Africa cannot depend on western legal machinations to develop their legal systems and transform their colonially impoverished societies. Instead, African countries must work towards understanding and supporting each other economically, socially, and legally, in a manner envisaged by Ubuntu philosophy (Flippin Jr., 2012; Khomba & Vermaak, 2012; Msengana, 2006). That way, Africa has a chance to prevail against the poverty inducing western ideological constructions implicit in modern comparative law. Regrettably, a problem lies in categorizing Africa into African countries. African countries' boundaries have mostly been demarcated by colonising powers based on longitude lines without regard for cultural and tribal locations (Fisher, 2012). Many Africans identify themselves first by their tribe or region of origin, and the country in which they are bordered, second (Okeke, 2011). There are many examples of countries' borders that cut through the middle of villages or tribes such as Nigeria, Zimbabwe, South Africa, Mozambique, just to name but a few. Moreover, within the same State there are diverse communities with different systems of law. To therefore express the traditional or tribal law of an African country would be to lump the different tribal and ethnic laws into one group for a study that would not make sense (Idang, 2015). For within each African State, are systems of tribal law whose functions are as diverse, and as innovative, as the legal system of any country (Michalopoulos & Papaioanou, 2015). The dynamic possibilities for studying these tribal and traditional systems of law present a practical problem in the methodology of studying African systems of law (Ndulo, 2011).

Comparative law has consistently failed to provide practical solutions to the development of human rights and international law in an African context (Ellis, 2011; Minow, 2010). The traditional western oriented approach to studying comparative law and understanding traditional law systems has often been used with little or no benefits accruing to African indigenes (Eberle, 2009). Indigenisation laws in countries such as Zimbabwe and South Africa

have been frowned upon as being anti-investment (Magure, 2012; Kriebaum, 2007; Moore, 2012; Warikandwa & Osode, 2017). Free market laws promoting foreign investment and free trade practices have often been preferred at the expense of laws that decolonise African economies and societies (Austin, 2010). Legal sanctions have been imposed on any countries, which seek to promote African value systems in pursuit of the best interests of African indigenes. The study of international law and its enforcement in Africa as a branch of comparative study in Africa is therefore a poisoned chalice. African countries are repeatedly cited for “violating” western international law norms yet transnational companies that are continuously looting African resources and impoverishing Africans are never required to account for their misdemeanours (Warikandwa, 2017). These realities suggest that comparative law analysis is toxic to Africa as is the lack of growth of African centred juridical, administrative and legislative institutions. The recent example of African countries’ threats to withdraw from the International Criminal Court is a case in point (Ibid).

African Laws Are to Western Countries a Jigsaw or Mosaic, which Needs to Be Integrated

Due to African countries’ respective indigenous and then colonial histories, they have multiple forms of law (Michalopoulos & Papaioannou, 2013). British jurist, Lord Denning, argued that the laws of Africa were, “... a jumble of pieces, much like a jigsaw or a mosaic: All have to be fitted together to form a single whole, and developed so as to meet modern conditions” (Okeke, 2011). Lord Denning’s questionable remark is the basis upon which western countries seek to employ comparative law as a tool to integrate African laws into a solitary legal system. Comparative law has thus been used by the western captured African governments as an instrument to determine how they would adjudicate matters, what laws they would follow in different areas, and which court systems they would use (Ibid). In the process, African value systems and norms were relegated for application in tribal communities. This approach signifies the denigration of African legal systems as being

backward, primitive, barbaric and cannibalistic while promoting western legal systems as being civilised and ideal for the development of Africa (Dibua, 2006).

African laws are thus viewed as being incapable of promoting and sustaining development in Africa. It is therefore not surprising that comparative law is regarded as representing a contemporary African government's value judgment and policy choices as indicated by the laws they chose to integrate. The more a country embraces western laws, the more it is regarded as being progressive, business friendly and embracing the rule of law. Anything to the contrary is perceived as being uncivilised and negative to the developmental aspirations of African countries. As such, African governments are only "good" if they adopt laws, which allow western countries with opportunities to continuously milk African resources and to socially and economically manipulate their impoverished masses. Kibwana has observed that African legal pedagogy is, preoccupied with studying, researching, and teaching foreign or imported laws resulting, largely, as a function of [African] legal systems having been founded on imposed law (Okeke, 2011). Kibwana further notes that the majority of comparative law is focused on transferring law from the "Western world" to African countries (Ibid). Western laws transplanted to Africa, to solve "local problems," have often failed to operate as expected. Africa must therefore "solve her legal problems better if the experiences of her countries are . . . used in fashioning common legal solutions" (Ibid). Kibwana raises a fundamental point, as the comparison of legal systems in African countries, which are more "similarly suited in economic, cultural, social, and historical circumstances, may prove to be of more practical value in solving Africa's legal problems (Ibid).

Conclusion

This chapter has advanced a strong case for African countries to rethink their reliance on comparative law. It is evident that comparative law has largely been employed as a tool for advancing social engineering in pursuit of western imperialist agendas. African countries have lost their identities and value systems through

employing foreign legal systems to regulate their societies. Decolonisation has failed to take place as African economies are still regulated through western laws. It is therefore imperative that reliance on comparative law be reviewed in African law schools, in legal practice, in courts and any other relevant legal institutions. If at all comparative law must continue to be relied upon, it is proposed that it be done within the African context. Such comparative study must focus on; 1) studying how transplanted foreign laws in Africa have negatively influenced Africa's development; and 2) evaluating how to integrate African Customary Law in Africa's legal system. To achieve this objective, African scholars must be encouraged to publish rigorous publications advancing the pan-African law/decolonisation agenda from a scientific perspective. Pan-African comparative law must thus be made a mandatory part of every African law school's curriculum as part of the decolonisation agenda. Legal academic literature must also be relevant to the African context as opposed to the current context in which legal textbooks are written in Europe, using the European context, for use in Africa. This approach only serves to promote the imperialist agenda and undermine Africa's development agenda.

Legal reform must not be driven by western legal traditions. African countries must focus on an African centred legal reform approach. The use of Ubuntu philosophy in any such legal reform will rid Africa of unjust neoliberal laws and inequality inducing policies. Adopting laws at the behest of western organisations such as the International Monetary Fund, the United Nations, European Union, and the World Bank in return for loan facilities, which keep African countries in perennial debt, must be frowned upon at all costs. If African countries want to harmonize their business and human rights laws as a means of solving colonially induced problems, let them do so amongst themselves. A pan-African comparative study must be conducted to evaluate in-country risks and the effect of supranational laws especially those introduced by international organisations. African countries should develop their own legal systems in order to grow their economies and decolonise. The continual reliance on western driven comparative law by African countries dovetails perfectly into the New World Order agenda, an

initiative that does not have Africa's developmental agenda as a priority. Radical transformation is thus sought in Africa's legal education and fraternity.

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The Jurisprudence of the Zimbabwean Judiciary on the Protection of the Right to Property with Specific Reference to the Fast Track Land Reform Programme and Operation *Murambatsvina*

Lovemore Chiduzza

Introduction

The position of land in Zimbabwe has been the most volatile political issue since the war of independence (Van Horn, 1994). Before the launching of the Fast Track Land Reform Program (FTLRP), several amendments were made to the Lancaster House Constitution of Zimbabwe that infringed on the right to property protected under the Constitution. It is necessary to note here that although it is widely described as a land reform, it was in fact land repossession or reclamation by indigenes – this difference between a mere land reform as opposed to land repossession is imperative for this chapter to underscore upfront. The Constitutional amendments were put into place by the state in an attempt to facilitate the acquisition of land by the Zimbabwean indigenes. Legal challenges on the right to protect the right to property of landowners were eroded as a result of such amendments. The supposed “erosion” of the independence of the judiciary in Zimbabwe also has been alleged by some Eurocentric commentators to have immensely contributed in the infringement of the “right” to protection of the property of descendants of colonialism in Zimbabwe. The purpose of this chapter is therefore to critically analyse the jurisprudence of the Zimbabwe judiciary on the right to protection to property and how the independence or supposed lack of it gravely eroded the enjoyment of such right.

Fast Track Land Reform Programme (FTLRP)

The conflict between the executive and the judiciary under the leadership of Gubbay CJ escalated at the start of the Fast Track Land Reform Program (FTLRP) and the various court rulings concerning the farm invasions of February 2000. Land reform has been a major volatile issue in Zimbabwe since the attainment of independence (Ibid). Historically, land reform in Zimbabwe started after the Lancaster House Agreement in 1979 and was done in an effort to equitably distribute land between the disenfranchised black population in Zimbabwe and the white minority (Lebert, 2006: 45). However, no meaningful land redistribution could take place under the Lancaster House Agreement and the government was obligated under the Lancaster House Constitution to acquire land on a willing seller-willing buyer basis during the first ten years of independence, after which a two-thirds majority vote in parliament could overturn it (Lebert, 2006: 46).

As a result of the slow nature of the land reform process, the government enacted a number of statutes and amended the Constitution in order to speed up the process of land acquisition and resettlement. Constitutional Amendment Number 11 was enacted to allow for the acquisition of land for resettlement, including utilised land, buildings, and improvements to land, whereas previously only utilised land could be acquired for resettlement. In 1990, the Land Acquisition Act No.5 of 1992 (LAA) was enacted to allow for the purchase of land at government set prices without right of appeal. The effect of the LAA was to enable government to acquire any land for resettlement purposes and to require “fair” compensation to be paid within a reasonable time, thus removing the “willing-seller, willing buyer” clause of the Lancaster House Agreement (Lebert, 2006: 45).

Efforts to speed up the land reform process in the country still remained futile, as the process was slow, cumbersome and expensive largely because of the commercial farmers’ resistance to make land available for land reform (Lebert, 2006: 48). The slow nature of the land reform process resulted in land occupations by the impatient landless people. The political threat imposed by the emergence of the

Movement for Democratic Change (MDC), and the absence of international support for land reform (after the Tony Blair British Government had refused to advance the process of land reform, in effect revoking Britain's obligations as per the Lancaster House Agreement in which the British government had agreed to finance land reform), led to the launching of the FTLRP in 2000 (Moyo & Matondi, 2003).

The FTLRP program, launched in July 2000, was designed to be undertaken in an accelerated manner with reliance on domestic financing. Thomas notes that the main objectives of the program were: to speed up the identification of land for compulsory acquisition; accelerating the planning and demarcation of acquired land and settler emplacement of this land; provision of limited basic infrastructure (such as, boreholes, dip tanks and access roads) and farmer support services (such as, tillage and agriculture inputs); and the provision of secondary infrastructure such as, schools, clinics and rural service centres, as soon as resources became available (Thomas, 2003).

In order to facilitate the FTLRP, Amendment Number 16 to the Lancaster House Constitution Act 5 of 2000 was introduced. It empowered the government to acquire commercial farms and to pay compensation for any improvements carried out on the farms. The amendment also shifted the obligation of paying compensation for agricultural land compulsorily acquired, to the former colonial master, Britain, thus absolving the Zimbabwean government from paying compensation for any acquired land (Section 16A (2) of the Lancaster House Constitution stated that '(i) the former colonial master has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and (ii) if the former colonial master fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.' It should be noted that the same section was retained in the Constitution of Zimbabwe 2013 under section 76 (7) (c) (i)). It should be noted that the inclusion of this provision resulted in the loss by Zimbabweans of their

constitutional right to claim any compensation for agricultural land forcibly acquired for resettlement (Saller, 2004: 69).

The passing of the amendment was an attempt to rightfully shift the obligation to pay compensation for land acquired for resettlement on Britain, the former colonial master. Thus section 16A(2)(c) (brought in by Amendment 16) of the Lancaster House Constitution of Zimbabwe established by the amendment stated that; (i) “the former colonial master has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and (ii) if the former colonial master fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement” (Section inserted by section 3 of Act 5 of 2000). Amendment number 16 also introduced a clause in the Lancaster Constitution which stipulated that compensation for agricultural land compulsorily acquired would be payable by the Zimbabwean government only for improvements effected on the property (Section inserted by section 2 of Act 5 of 2000 which resulted in the inclusion of Article 16B (2) (b) in the Constitution of Zimbabwe which read “no compensation shall be payable for land referred in paragraph (a) except for any improvements effected on such land before it was acquired”). The conduct of the government in unilaterally varying the conditions agreed on at the Lancaster House negotiations has been criticised. Saller is of the view that the above-mentioned constitutional clause absolving the government from paying compensation, if the former colonial master fails to do so is not proper, as it is not possible for one country to unilaterally impose constitutional obligations on another (Saller, 2004: 13). Saller further submits that in the absence of any bilateral agreement between Zimbabwe and the ‘former colonial master’, the inclusion of section 16A therefore deprived Zimbabweans the constitutional right to claim any compensation for agricultural land forcibly acquired for resettlement (Ibid).

The launch of the FTLRP resulted in the expropriation of a number of farms across the country, with several families being resettled on these acquired farms. Several court applications were

made challenging the invasions, thus bringing the judiciary into conflict with the executive. The legal challenges are discussed below:

Legal Challenges to the FTLRP

Widner and Scher note that prior to the introduction of the land reform, the courts stood firm in the face of executive pressure on a variety of issues, from suspension of *habeas corpus* and trials within a reasonable time to freedom of speech (Widner & Scher, 2008: 249). The courts were thus, truly independent and the period before the 2000 land reform program has been characterised as:

The golden period of human rights litigation in Zimbabwe where the court did not always find for the ordinary litigant, but one knew that whatever point was being raised was carefully considered, and one knew even when the court found for the state that the judgment represented the honest view of the judges who heard the matter (De Bourbon, 2003).

De Bourbon praised the Zimbabwean judiciary prior to the launching of the FTLRP (led by the then Chief Justice Anthony Ray Gubbay) for its strong reputation for human rights protection before the commencement of the land reform programme.

The constitutionality of the FTLRP was challenged in the case of *Commercial Farmers Union (CFU) v Minister of Lands, Agriculture and Resettlement* 2000 (2) ZLR 469 (SC); 2001 (2) SA 925 (ZS) (CFU case) (See also a series of cases from Southern African Development Community Tribunal (SADCT) which also ruled that the FTLRP was unconstitutional as it violated the right to property protected in the Constitution; *Mike Campbell (PTY) Limited v The Republic of Zimbabwe* (2/07) [2007] SADCT 1, *Campell v Republic of Zimbabwe* (SADC (T) 03/2009) [2009 SADCT 1 (5 June 2009) and *Mike Campbell (Pty) Ltd v Republic of Zimbabwe* (2/2007) [2008 SADCT (28 November 2008)). The case sought to challenge the manner and approach with which the FTLRP was launched. An interdict was granted by the Supreme Court, barring further land acquisitions by the government on the grounds that the FTLRP was unconstitutional as it was carried out in

a violent and haphazard manner. Since the judiciary was independent, it was no surprise that in his judgment Gubbay CJ stated that:

Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being committed with impunity. Laws made by Parliament have been flouted by the government. The activities of the last nine months must be condemned (*Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZS) 943E-F).

The court also went further to state that:

The settling of people on the farms had been entirely haphazard and unlawful. A network of organisations, operating with the complete disregard of the law, has been allowed to take over from the government. War Veterans, villagers and unemployed town people have simply moved onto farms. They have been supported, encouraged, transported and financed by party officials, public servants, the Central Intelligence Organisation (CIO) and the Army. The rule of law has been overthrown in the commercial farming areas and farmers and farm workers on occupied farms have been denied the protection of the law (*Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZS) 940B-D).

In his judgment Gubbay CJ noted that there was no actual dispute regarding the land reform program since it was necessary and essential for the future peace and prosperity of Zimbabwe, and hence resettlement had to be carried out in conformity with the law that governed land resettlement in the country (*Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZS) 938E). It was therefore important for government to put into place a program of land reform that complied with the Constitution so as to ensure that resettlement was carried out lawfully (*Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2001 (2) SA 925 (ZS) 938H). The Commissioner of Police, Augustine Chihuri, was instructed by the Court to enforce the court order and to disregard any instruction from any person holding executive power

that countered the eviction order. However, the court order was ignored and the Commissioner later appealed against the judgment of the Court, arguing that the police were not in possession of sufficient resources that would enable them to implement the court order (*Commissioner of Police v Commercial Farmers Union* HC 3985/2000 (Unreported)). Gubbay notes that the non-compliance with the court order showed how the executive viewed the land issue as a political issue rather than a legal issue and hence the non-compliance with the ruling thus vitiating the principle of equality before the law (Gubbay, 2001: 15).

The Supreme Court judgment prompted the government to plausibly enact new legislation, namely the Rural Land Occupiers (Protection from Eviction) Act, which was “fast tracked” through parliament in order to counter the court judgment (Chapter 20:26/Act 13 of 2001). The main purpose of the Act was to protect from eviction for a period of twelve months (originally it was a period of six months) individuals who had occupied land up to February 2001 without following proper procedures (Section 3 of the Rural Occupiers (Protection from Eviction) Act). The promulgation of the Act also resulted in the suspension of applications by the landowners for court orders for the eviction of settlers from all farms. The Act also protected all settlers (invaders) against criminal and civil liability for occupation of properties and any damage caused to the properties (Section 3(2) of the Rural Occupiers (Protection from Eviction) Act).

Public Attacks and Forced Resignations

The judgment of the Supreme Court in the *Commercial Farmers Union (CFU) v Minister of Lands, Agriculture and Resettlement* 2000 2 ZLR 469 (SC) heightened tensions that existed between the executive and the judiciary and had been evident since the attainment of independence. Public attacks and rebukes of members of the judiciary reached their peak during this period with members of the executive and war veterans attacking the judiciary for its attitude towards the FTLRP.

The judgment in the CFU case drew the ire of the ruling party and party supporters against the judges who had handed down

judgment in the case. The Court ruling was deemed an embarrassment and undermined government's ability to rule and address the land imbalances that existed since the attainment of independence (Matyszak, 2006: 338). A campaign was therefore launched to get rid of judges, "under the guise that these judges were remnants of the racist governmental institutions of the former colonial regime and were therefore against the land reform process in Zimbabwe" (Martin, 2006: 384; Harold-Barry, 2004: 205). At the forefront of the attacks on the judges were government officials, ruling party parliamentarians and ministers, party youth, the former Chief Justice Chidyausiku (See for example in the case of *Minister of Lands v Paliouras* 2001 (2) ZLR 22 (S) para 27H-28A where in his minority judgment Chidyausiku CJ questioned and criticised the judgment in the *Commercial Farmers Union* case (discussed above)), and members of the Zimbabwe National Liberation War Veterans Association (ZNLWVA) (The [t]hen Minister of Information Jonathan Moyo publicly spearheaded a campaign accusing the Supreme Court judges, in particular, Gubbay CJ, of being biased in favour of white land owners at the expense of the landless majority and called for Gubbay CJ to resign. The former President of Zimbabwe Robert Mugabe who was also publicly involved in the attack on the judges and in disowning the courts plausibly stated that, "... the courts can do what they want. They are not the courts for our people and we shall not even be defending ourselves in the courts." On the other hand War Veterans invaded the Supreme Court where judges were about to hear a constitutional application brought by the CFU, and shouted political slogans, stood on chairs, benches and tables in a show of absolute contempt of the courts who were sympathetic to western interests. The current Chief Justice Chidyausiku (then the Judge President) in a case pitting judge against judge joined the public attacks on the Supreme Court and Gubbay CJ by accusing Gubbay CJ of bias in favour of white commercial farmers. For more see Compagnon, 2011: 154). The war veterans invaded the Supreme Court and threatened violence against certain individual judges and pressured them to resign; with some success, as Gubbay CJ was forced to retire prematurely in March 2001 after the ruling in the Commercial Farmers Union case (Human Rights

Watch, 2008: 14). Gubbay CJ was accused of being in favour of white landowners and was asked by the Minister of Justice, Patrick Chinamasa, to step down since the government could no longer guarantee his security (Ibid). It should be noted that no condemnation of such attacks was made by the government showing clearly that they did not support the imperialist oriented decision of the Court.

It should be noted that the public attacks on the judiciary and the forced removal of independently-minded judges clearly showed a justifiably blatant and contemptuous disrespect for the process of the Constitution which guaranteed judicial independence (Goredema, 2004: 103). The personal attacks and intimidation aimed at the judges also showed how the personal safety of judges was put at risk by their misguided predisposition to pronounce pro-western judgements in an impoverished African society. The author appreciates the fact that the judicial institution is not beyond criticism (Addo, 2005: 322). However, pro-western proponents contend that judges should not be subjected to government intimidation in the hope that they become more compliant and rule in favour of the executive (Kosar, 2007: 4-8). Any criticism of judges should therefore be legitimate and should arise from what is done in the discharge of the judicial duty (Bright, 1997: 308). It must be borne in mind that the land reform programme is a legitimate and important national objective for the previously and still disadvantaged Zimbabwean indigenes. The judiciary ought to be sensitive to this inescapable reality. This is regardless of the views of other parties such as Goredema, who contend that it should be noted that lack of official condemnation of the actions of the war veterans and the unjustified and unreasonable attacks on the judiciary undermined the crucial role that the judiciary plays in enforcing the law and upholding the Constitution (Goredema, 2004: 101-103). Since the launching of the FTLRP, the executive systematically eroded the independence of the judiciary in Zimbabwe through intimidation, harassment and physical assault of judicial personnel.

The era of Gubbay CJ appeared to undermine the land reform programme and stood steadfastly strong against any executive attempts to advance black ownership of land. This can be mainly seen

in the jurisprudence that advanced human rights (especially the property clause) protection and promotion in the country (See also amongst other cases *S v Mushayandebvu* 1992 (2) ZLR 62 (SC); *S v Marutsi* 1990 (2) ZLR 370 (SC) where the right to legal representation has been emphasised by the courts; *In re Munhumeso and Others* 1994 (1) ZLR 49 (SC) 56; 1995 (1) SA 551 (ZS) 557; *Retrofit (Pty) Ltd v PTC and Another* 1995 (2) ZLR 199 (SC) 212-213 where the right of freedom of expression in section 20 of the Constitution has been emphasised by the Supreme Court to be one of the most fundamentally important rights).

Chidyausiku CJ Upholds Fast Track Land Reform Programme

Following the resignation of a number of judges on account of the pro-western agenda, a number of judges were appointed to the Supreme Court (It should be noted that at the time the judgment was delivered Chidyausiku CJ had been confirmed as the new Chief Justice and government had appointed three new judges to the Supreme Court. As a result, the composition of the court in this case was made up of the Chief Justice and the three newly appointed judges, and one of the older existing judges of the Supreme Court). Pro-land reform judges were plausibly appointed to the Supreme Court headed by the former Chief Justice Godfrey Chidyausiku. It should be noted that Chidyausiku CJ had previously served in government and his appointment was debatably viewed to be political. This view is supported by Madhuku who stated that:

The political angle rose from the following features: the new Chief Justice came from the High Court and was chosen over four serving judges of the Supreme Court. This was contrary to a precedent that the same government had set in 1990 when it appointed Chief Justice Gubbay, who was the most Senior Supreme Court judge. Further, just a year before his appointment, the new Chief Justice had chaired the highly controversial government appointed Constitutional Review Commission whose Draft Constitution for Zimbabwe had been rejected in a national referendum. In addition, his publicised views on land reform mirrored those of the government (Madhuku, 2006: 361).

The appointment of Chidyausiku CJ by the President further strengthened the questionable view that the appointment of judges in Zimbabwe was subject to political interference. It is argued that since 2000, the President has appointed to the bench judges who allegedly have close connections to the government and known sympathisers of ZANU-PF (Human Rights Watch, 2008: 15).

One of the first cases to be heard by the Supreme Court under the leadership of Chidyausiku CJ was that of the *Minister of Lands, Agriculture and Rural Resettlement v Commercial Farmers Union* 2001 (2) ZLR 457 (S) (CFU). In this case the Minister of Lands sought to overturn an interdict that had been previously issued in the case of *Commercial Farmers Union v Minister of Lands, Agriculture and Resettlement* 2000 (2) ZLR 469 (SC) (by the Gubbay bench) in which the Court had ordered a stop to farm invasions as they were “unlawful” and in “violation” of the supposed owners’ constitutional rights (CFU alleged that they were being improperly treated because of their race in contravention of section 23 of the Lancaster House Constitution; they were being denied protection of the law and equality before the law under section 18 of the Lancaster House Constitution). Prior to this case, an application had been made, and dismissed, for the recusal of Chidyausiku CJ as the CFU questioned the impartiality of the Chief Justice because of his close association with the ruling party and also because of his previous statements endorsing the government’s land policy (CNN, 2001 which states that the Chief Justice refused to recuse himself and cited that the CFU and its advocate simply disliked his political background). The newly reconstituted Supreme Court overturned the interdict that had been initially granted by Gubbay CJ outlawing farm invasions in the country.

In his ruling Chidyausiku CJ (in whose judgment the three other newly appointed judges of the Supreme Court concurred) was of the commendable view that the government had complied with the Supreme Court order that had required it to put in place a proper program of land reform that complied with the Constitution (*Minister of Lands, Agriculture and Resettlement v Commercial Farmers Union* 2001 (2) ZLR 457 (S)). The new Chidyausiku bench was of the view that government had taken sufficient steps to restore the rule of law as

regards commercial farms and that the rule of law did not require a totally crime free environment but a determination of whether the government had taken adequate measures to enforce law and order (Ibid). This view was stated despite the fact that the CFU had presented “detailed evidence” of the turmoil on the farms and that the rule of law had not been restored with farmers being evicted and prevented from conducting their operations.

In a dissenting judgment in the same case Ebrahim J (the only judge from the previous Gubbay bench to hear the matter as other senior judges from the Gubbay era, such as, Sandura J, Muchecheitere J and McNally J were excluded from the hearing) (Human Rights Watch, 2008: 15. It should be noted that with the ascendancy of Chidyausiku CJ, there was a significant change in the method of allocation of cases to the judges. Previously cases had been assigned by the Registrar of Court on a roaster basis. This system was halted by Chidyausiku CJ, then as the Judge President and took direct charge of the allocation of cases. It therefore makes sense in this case as to why a number of the judges from the Gubbay bench were excluded from hearing the matter as they adopted a pro-western agenda which defeated the land reform programme agenda) was erroneously of the view that the rule of law had not been restored in the occupied farms and that the government had not come up with a lawful programme of land reform (*Minister of Lands, Agriculture and Resettlement v Commercial Farmers Union* 2001 (2) ZLR 457 (S) 490F-491B). Ebrahim J added that the most important aspect that had to be considered was whether the program was being implemented “lawfully” and in accordance with the legally stipulated processes.

Madhuku notes that the fact that this case was heard by different members of the Supreme Court made the outcome of the case predictable (Madhuku, 2006: 362). Madhuku further states that the deliberately calculated appointment process ensured that government was able to achieve a composition of the Supreme Court, which not only shared its political beliefs but also was prepared to give an interpretation of the law, which implemented those beliefs (Ibid). Critics of this judgment state that the ruling by Chidyausiku CJ was heavily predicated upon political expediency rather than on the “law” as evidence existed that violence on

commercial farms was on the increase and little or nothing had been done to stem that violence (Human Rights Forum n.d.; Moyo, 2007: 37). Mapfumo questionably notes that in his judgment Chidyausiku CJ confined his role only to seeing if the procedures were followed but not to marry that to the factual circumstances on the ground (Mapfumo, 2005: 35). Thus, there was a clear divergence from the approach earlier adopted by Gubbay CJ, and thus the approach adopted by Chidyausiku CJ evoked the perception that the judiciary was rubber-stamping executive lawlessness and thus failing the right to security of property for white commercial farmers (Ibid).

Ouster of Jurisdiction of the Courts Over Land Issues

In an effort to ensure that no court challenges could be made about the FTLRP, the government justifiably enacted Constitutional Amendment Number 17 Act 5 of 2005, which ousted entirely the jurisdiction of the courts over cases of acquisition of land by the state. This was stated in section 16B(3)(a) of the Lancaster House Constitution which stated that:

the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2) (a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2) (b), that is to say, a person having any right or interest in the land- (a) shall not apply to court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge (Section 2 of Act 5 of 2005).

This amendment was justifiably enacted despite the western oriented Lancaster House Constitution stipulating the requirements to be met by a law, which provided for compulsory acquisition of property. These requirements included the fact that any compulsory acquisition had to be effected for public purposes specified in section 16(1) of the Lancaster House Constitution; the law under which the property acquired must afford the owner reasonable notice of the

acquisition; the law must provide for fair compensation; and the law must afford the owner an opportunity to have disputes over the acquisition settled by a court (Section 16(1) (a-f) of the Lancaster House Constitution).

The inclusion of section 16B into the Lancaster House Constitution correctly nullified all rights that land owners possessed before the enactment of the amendment. The amendment also justifiably limited the enjoyment of the rights mentioned above as it removed the right to notice to be given to landowners, the right to compensation except for improvements to their land, and the right to approach a court. It should be noted that the provision, whilst appearing contrary to the national and international law in relation to the right to property (Section 18(1) of the Lancaster House Constitution stated ‘that everyone is entitled to the protection of the law and section 18(9) further guarantees everyone the right to have disputes over civil rights decided, after a fair hearing, by an independent and impartial court or tribunal,’ it provided a robust basis for advancing the land reform programme.

Article 14 of the African Charter on Human and Peoples’ Rights, to which Zimbabwe is a state party, states, “The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.” The new property clause in the Lancaster House Constitution “arbitrarily” deprived landowners of their property in that deprivation may be effected without reason at the whim of any state official. This supposedly contradicted the principles of international law and debatably rendered “impotent” national and international protection of the fundamental rights to protection of the law and a fair hearing (Section 18(1) of the Lancaster House Constitution stated that ‘everyone is entitled to the protection of the law’ and section 18(9) further guaranteed everyone the right to have disputes over civil rights decided, after a fair hearing, by an independent and impartial court or tribunal. Article 7(1) of the African Charter on Human and Peoples’ Rights states: ‘Every individual shall have the right to have his cause heard. This comprises: (a) the right to appeal to competent national organs against acts of violation his fundamental rights as

recognised and guaranteed by conventions, laws, regulations and customs in force.’ Article 14(1) of the International Covenant on Civil and Political Rights, to which Zimbabwe is a state party, states that ‘In determination of his rights and obligations in a suit t law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’ The amendment therefore took away these rights as the section expressly removed the issue of land from the jurisdiction of the courts). However, it must be questioned as to how else the land reform programme was to be implemented without raising the ire of the international community, which stood as a key beneficiary to the foreign ownership of land in Zimbabwe. The neoliberal economic order, which favours white ownership of land, would hardly favour a distributive justice approach to land reform in Africa (Warikandwa *et al*, 2017).

Therefore, the amendment was likely to infringe the western oriented international instruments, such as, the African Charter on Human and Peoples’ Rights (ACHPR), and the International Covenant on Civil and Political Rights (ICCPR), which grant all individuals the right to have their dispute heard by a competent court. The amendment also violated the principles of maintaining and promoting an independent judicial system as well as the doctrine of separation of powers as it prevented the judiciary from acting as a necessary check on the actions of the executive and parliament and directly undermined the rule of law doctrine in Zimbabwe (Zimbabwe Lawyers for Human Rights, 2009: 2). It must be observed at this point that African legal norms are collectively oriented as opposed to the individual inclination of western legal norms.

It should be noted that the issue dealing with the ousting of the jurisdiction of the courts has been dealt with on several occasions by the African Commission on Human and Peoples’ Rights. The Commission has pronounced that such action taken by members of the executive is in direct violation of the western oriented Article 7 of the Charter which provides for the rights of all individuals to have their cause heard and to have the right to appeal to competent national organs against acts violating fundamental rights (See *Zimbabwe Human Rights NGO Forum v Zimbabwe* Communication

No.245. (2002) where a clemency order exonerating perpetrators of politically motivated crimes prevented the complainant from having recourse for crimes. The Commission held that such a state of affairs resulted in a situation where the judiciary could no longer provide a check on the executive branch of government and that in order for the rule of law to be upheld, individuals whose rights had been infringed had to have an effective remedy. See also *Constitutional Rights Project, Civil Liberties Organisation and Media Agenda v Nigeria* Communication No. 140/94, 141/94, 145/95 (1999), a case which dealt with ouster clauses preventing Nigerian courts from hearing cases brought by publishers contesting the search and seizure of their premises. In this case, the Commission held that such a state of affairs would result in a legal situation where the judiciary could no longer provide a check on the executive, which was an important component of any constitutional democracy).

Legal Challenge to the Ousting of the Jurisdiction of the Courts on Land Issues

Chidyausiku CJ and other members of the current bench also made several other plausible rulings upholding the legality of the land reform programme and the amendments to the Constitution removing the jurisdiction of the courts from hearing any cases dealing with the challenges to the land reform. A prime example is the case of *Mike Campbell (Pty) Ltd and Another v Minister of National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1 (22 January 2008). In this case, the applicants were owners of a farm, which had been compulsorily acquired as being necessary for implementation of the land reform program. In challenging the acquisition of the farm, the applicant contended that the enactment of the Constitution of Zimbabwe Amendment 17, which introduced section 16B into the Constitution, and the acquisition of agricultural land belonging to the applicant, supposedly violated the Declaration of Rights in relation to the rights protected under sections 11 (contained in the Preamble of the Declaration), 16(1) (the right not have private property compulsorily acquired without the authority of law), 18(1) (the right to protection

of the law), 18(9) (the right to a fair hearing and determination of civil rights or obligations by an impartial court of law, and 23(1) (the right not to be treated in a discriminatory manner on the grounds of race and colour) (*Mike Campell v Minister for National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06-2008 ZWSC 1). The applicants contended that the amendment was null and void as it was inconsistent with the essential features of the Lancaster House Constitution with regards to the right to due process and protection afforded to every citizen in Zimbabwe (Ibid).

The newly constituted Supreme Court bench, led by Chidyausiku CJ, delivered its judgment on January 22, 2008, and justly dismissed Campbell's challenge to the constitutional validity of Amendment 17 and the compulsory acquisition of land for resettlement in Zimbabwe (Ibid). The Court was of the view that race was not an issue in the compulsory acquisition of farms because neither the relevant provisions of section 16B of the Constitution (Zimbabwe Lawyers for Human Rights in 2005 filed a complaint with the African Commission on Human and Peoples Rights on the constitutional validity of Amendment No. 17. See *Zimbabwe Lawyers for Human Rights, SADC Lawyers Association, Law Association of Zambia, Tanzania Law Society and Others v The Government of Zimbabwe* ACHPR case ACHPR/LPROT/CPMM/ZIM/321. This was a joint petition of law societies and law based organisations within the SADC region and beyond focusing on the constitutional validity of Amendment No.17) nor the gazetted provisions relating to land acquisition made any specific reference to race or colour (*Mike Campell v Minister of National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1). In his reasoning in dismissing the application, Malaba JA, also plausibly stated that the Government of Zimbabwe had an inherent right to compulsorily acquire property and that Parliament had the power to change the Constitution of Zimbabwe in accordance with section 52 of the Lancaster House Constitution (Section 52 of the Lancaster House Constitution stated that '(1) Parliament may amend, add or repeal any of the provisions of this Constitution: Provided that, except as provided in subsection (6), no law shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms'). Malaba JA

further noted that in clear and unambiguous language the legislature in the proper exercise of its powers had ousted the jurisdiction of the courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of section 16B(2) (a) of the Constitution could have been sought (*Mike Campbell v Minister for National Security Responsible for Land Reform and Resettlement* Supreme Court Case No. 124/06- 2008 ZWSC 1). In support of the intention of the legislature, Malaba JA reasoned that the legislature had unquestionably stated that in the enactment of a fundamental law, any acquisitions of farms could not be challenged in any court of law and hence this view had to be respected. The Court thus correctly viewed the application by Mike Campbell as an abuse of the right to protection of law as it sought to challenge the lawful acquisition of farms (Ibid).

It should be noted that the ouster of the jurisdiction of the courts to hear land cases justifiably undermined the rights of the applicants as stated above as no right is absolute at law (African jurisprudence has not been developed in a manner as to support plausible policy and constitutional objectives such as the land reform programme. For example, the SADC-Tribunal, in the case of *Mike Campbell (Pty) Ltd v Republic of Zimbabwe* (2/2007) [2008 SADCT (28 November 2008), held that the ouster of the jurisdiction of the courts was in breach of Articles 4(c) and 6(2) of the SADC Treaty. The SADC Tribunal directed the government to take all necessary measures, through its agents, to protect the possession, occupation, and ownership of the lands of the applicants and to take all appropriate measures to ensure that no action was taken, pursuant to amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those, by the applicants. However, the same tribunal did not bother to address the colonial dispossessions of land without compensation the Zimbabwean indigenes were subjected to by the forefathers of the applicants). The Amendment therefore justifiably broadened the range of limitations on the right to property for purposes of redressing colonial injustices. The approach of the Court in negating to critically analyse the implications of the Amendment for human rights indicates the manner in which the current judiciary justifiably

sought to uphold executive decisions in order to legitimise actions of the executive in pushing forward the land reform agenda (Mapfumo, 2005: 38). As a result of the ouster clause in the Lancaster House Constitution, Mike Campell and other farmers approached the Southern African Development Committee Tribunal (SADCT) to seek remedy and challenge the constitutionality of the FTLRP program. The SADCT cases are discussed below:

Mike Campell SADC Tribunal Cases

Before the Supreme Court could deliver its judgment in the case and the challenge to constitutional amendment No.17, Mike Campell together with seventy-seven (77) other persons, filed an application with the Southern African Development Committee Tribunal (SADCT) challenging the acquisition of farms in Zimbabwe (*Mike Campell (PTY) Limited v The Republic of Zimbabwe* (2/07) [2007] SADCT 1 (13 December 2007)). The applicants sought an interim measure from the Tribunal restraining the Zimbabwean government from justifiably removing, or allowing the removal of, the applicants from their agricultural land and mandating the government of Zimbabwe to take all the necessary and reasonable steps to protect the occupation by the applicants of their land until the dispute had been finally adjudicated (Ibid). The applicants argued that the land acquisition process was racially motivated and was “illegal” as it was in direct violation of Article 6 of the SADC Treaty and the African Charter on Human and People’s Rights which outlaws arbitrary and racially motivated government action (Article 6(2) of the SADC Treaty states, “SADC and member states shall not discriminate against any persons on grounds of gender, religion, political views, race, ethnic origin, culture or disability”. Article 2 of the African Charter states that “every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present charter without distinction of any kind such as race, ethnic group, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status”).

The decision of the Tribunal addressed the issue whether the Tribunal had jurisdiction to hear the case as required by Article 15(1)

of the SADC Protocol (Article 15(1) of the SADC Protocol on the Tribunal reads, “The Tribunal shall have jurisdiction over disputes between States, and between natural or legal persons and States”). The Tribunal ruled that it had jurisdiction to hear the matter as the application met the requirements stipulated in Article 15(2) of the Protocol (Article 15(2) of the SADC Protocol on the Tribunal reads, “No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction”). Another issue that had to be addressed by the Tribunal was whether the applicants had been denied access to domestic courts in violation of the SADC Treaty (*Mike Campbell (PTY) Limited v The Republic of Zimbabwe* (2/07) [2007] SADCT 1 (13 December 2007)). This was after the Government of Zimbabwe, the respondents, had opposed the case and stated that the applicants had failed to comply with Article 15(2) of the SADC protocol which requires the exhaustion of all internal remedies before a case could be brought before the tribunal (Article 15(2) of the SADC Protocol on the Tribunal reads, “No natural or legal person shall bring an action against a State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction”). The main contention of the respondents (Zimbabwe Government) was that the applicants still had a pending matter in the Supreme Court of Zimbabwe in which the relief sought was similar to the one being sought from the Tribunal (*Mike Campbell (PTY) Limited v The Republic of Zimbabwe* (2/07) [2007] SADCT 1 (13 December 2007)). The applicants on the other hand argued that it was impossible to seek such relief from the courts in Zimbabwe since the enactment of article 16B(3)(a) of the Lancaster House Constitution which ousted the jurisdiction of courts in matters concerning land made it impossible for any court to grant such relief as the section was in clear violation of the right to have any dispute settled by any court of law in Zimbabwe (*Mike Campbell (PTY) Limited v The Republic of Zimbabwe* (2/07) [2007] SADCT 1 (13 December 2007)).

The Tribunal ruled that the issue of the exhaustion of all internal remedies was not relevant in this case since the applicants were seeking an interim measure of protection pending the final

determination of the matter by the Tribunal (Ibid). The Tribunal ruled that there was a *prima facie* right that the applicants sought to be protected which involved the right to peaceful occupation and use of land since there was a threat and interference with that right (Ibid). The Tribunal granted an interim order and ordered the Republic of Zimbabwe to take no steps, or permit no steps to be taken, directly or indirectly, whether by its agents or by orders, to evict from or interfere with the peaceful residence on and beneficial use of the farms belonging to the applicants (See <http://www.saflii.org/sa/cases/SADCT/2007/1.html> (Accessed 10 July 2009)). The same ruling was also made on the following SADC Tribunal cases SADC (T) No 03/08, 04/08, and 06/08).

The final judgment in the *Campell case* by the Tribunal was handed down on 28 November 2008 (*Mike Campell (Pty) Ltd v Republic of Zimbabwe* (2/2007) [2008 SADCT (28 November 2008)]). The Tribunal ruled in favour of Mike Campell and 77 other white commercial farmers. The Tribunal held that the Republic of Zimbabwe was in breach of its obligations under Articles 4(c) (Article 4(c) of the SADC Treaty reads, “SADC and its Member States shall act in accordance with the following principles (c) human rights, democracy and the rule of law”) and 6(2) of the SADC Treaty and that Amendment No.17 of the Lancaster House Constitution was also in breach of the same provisions. The Tribunal further found that the applicants had been denied access to courts in Zimbabwe; that the applicants had been discriminated against on the grounds of race (In a dissenting judgment in the *Mike Campell* case, Judge Onkemetse Thosa (SADCT) in his dissenting opinion came to a conclusion that Amendment 17 did not discriminate against the applicants on the basis of race and stated that the amendment did not violate the respondent’s obligation under Article 6(2) of the Treaty. The learned Judge stated that Amendment 17 was mainly targeted at agricultural land and not people of a particular racial group and that not only white people had been affected by the said amendment in Zimbabwe) and that fair compensation was payable to the applicants for their land compulsorily acquired by the Republic of Zimbabwe. The Tribunal further directed the government to take all necessary measures, through its agents, to protect the possession, occupation

and ownership of the lands of the applicants and to take all appropriate measures to ensure that no action was taken, pursuant to Amendment 17, directly or indirectly, whether by its agents or by others, to evict from, or interfere with, the peaceful residence on, and of those farms, by the applicants (*Mike Campell (Pty) Ltd v Republic of Zimbabwe* (2/2007) [2008 SADCT (28 November 2008)]).

It should be noted that the government of Zimbabwe justifiably failed to comply with the judgment of the Tribunal and as a result another urgent application was made by the applicants to the Tribunal seeking a declaration that the Zimbabwean government was in “breach and contempt” of the 28 November 2008 Tribunal’s decision (*Campell v Republic of Zimbabwe* (SADC (T) 03/2009) [2009 SADCT 1 (5 June 2009)]). In order to show the “unwillingness” of the respondents to implement the judgment of the Tribunal, the Tribunal cited a speech made by Deputy Chief Justice, Luke Malaba, who stated that the Tribunal had no jurisdiction to hear and determine the Campell application (The Zimbabwean Situation, 2009) and a statement made by the President of Zimbabwe in which he labelled the Tribunal’s decision as being “nonsense and of no consequence” (American Renaissance, 2009). As a result of continued “violence” and further farm invasions, the Tribunal in accordance with Article 32(5) of the SADC Protocol reported its findings to the SADC Head of State summit so that that the Heads of States could take appropriate action against the government of Zimbabwe (*Campell v Republic of Zimbabwe* (SADC (T) 03/2009) [2009 SADCT 1 (5 June 2009)]).

In response to the final ruling of the SADC Tribunal, the Zimbabwean government issued out a statement asserting that any decision that the Tribunal may have or may make in future against the Republic of Zimbabwe would be deemed to be null and void (Shango, n.d.). The same statement also purported to withdraw Zimbabwe from the jurisdiction of the SADC Tribunal. In a legal opinion Gauntlett SC, a South African lawyer, questionably dismissed the view of the Zimbabwean government and stated that such statement lacked any legal foundation (Gauntlett, 2009). This was so because Zimbabwe was a signatory to the SADC Treaty (Zimbabwe entered into the treaty in Namibia on 17 August 19992

and the Treaty was ratified by the Legislature on 17 November 1992. The Treaty entered into force on 30 September 1993). Secondly, Zimbabwe was bound by the Protocol to the SADC Tribunal although it had not ratified it (Article 16(2) of the Treaty reads, “The SADC Tribunal is binding on all SADC Members as the Protocol forms an integral part of the SADC Treaty”). Mr Gauntlett pointed out that Zimbabwe had in the past conceded to the jurisdiction of the SADC Tribunal in a number of cases that had been brought before the Tribunal (Gauntlett, 2009) and that the SADC Tribunal had held in a number of cases that Zimbabwe was subject to its jurisdiction and therefore the Zimbabwean government had no legal basis as the government is bound by the decisions of the SADC Tribunal and have been in clear violation of not implementing the rulings of the Tribunal (Ibid: 12). *However, regardless of Gauntlett’s imperialist views, the SADC Tribunal’s insistence on forcing Zimbabwe to comply with an anti-land reform ruling it had taken led to the Tribunal’s demise. The judges sitting on the Tribunal failed to appreciate the ideological importance of the land issue in Southern Africa. This assertion is justified by recent policy directives in South Africa aimed at realising land expropriation without compensation in order to address colonial injustices.*

***Gramara (Pty) Ltd and Cloete v The Government of Zimbabwe and Others* Zimbabwe High Court 2010**

In an effort to seek registration of the SADC Tribunal case in the matter of *Mike Campbell (Pty) Ltd and others v the Republic of Zimbabwe*, discussed above, an application to register the same was made and rightfully dismissed by the High Court in Zimbabwe (*Gramara (Pty) Ltd and Cloete v The Government of Zimbabwe*, High Court 2010 (Unreported case). The same application for the registration of the SADCT judgment was brought before the North Gauteng High Court, which questionably granted Afriforum, a civil rights group the right to sue the Zimbabwean government over the expropriation of South African owned farms. The ruling paved the way for the farmers whose properties were seized without compensation to attach assets in South Africa belonging to the Zimbabwean Government. Some of the assets have been attached in Cape Town (See the case of

Government of Zimbabwe v Fick and Others 2013 (5) SA 325). The registration of the judgment was to be done in line with the SADC Tribunal Protocol, which holds all the decisions of the Tribunal as final and binding on all Member States and prescribes that the enforcement and domestication of judgments of the Tribunal are to take place in accordance with the local laws of the relevant Member State. The Treaty stipulates that member states are obliged to ensure that their local laws provide for the domestication of SADC Tribunal decisions (Article 32 of the Protocol on the Tribunal reads, (1) “ the law and rules of civil procedure for the registration and enforcement of foreign judgments in force in the territory of the State in which the is to be enforced shall govern enforcement (2) States and institutions of the Community shall take forthwith all measures necessary to ensure execution of decisions of the Tribunal (3) Decisions of the Tribunal shall be binding upon the parties to the dispute in respect of that particular case and enforceable within the territories of the State concerned (4) Any failure by the State to comply with a decision of the Tribunal may be referred to the Tribunal by any party concerned (5) if the Tribunal establishes the existence of such failure, it shall report its findings to the Summit for the later to take appropriate action.” See also The common law in Zimbabwe allows for applications for the registration of international judgments not covered by the Civil Matters (Mutual Assistance) Act Chapter 8:02). The questions that the court had to answer in the *Gramara* case related to whether the SADC Tribunal was endowed with the jurisdictional competence to rule over the *Campell* case and as to whether the enforcement of the SADC Tribunal decision would be contrary to public policy in Zimbabwe (*Gramara (Pty) Ltd and Cloete v The Government of Zimbabwe*, High Court 2010).

Reasoning of the Court in the *Gramara* Case

Justice Bharat Patel in his judgment, contrary to an earlier statement by the Justice Minister that the SADC Tribunal had no jurisdiction in the case, held that the SADC Tribunal had jurisdiction within the SADC States but was not entirely persuaded that the Tribunal could entertain and adjudicate alleged violations of human

rights which might be committed by member states against their own nationals (Ibid). It is submitted that this view can be criticised taking into consideration that the principles of the SADC Treaty, which provide guideline principles to the Tribunal, clearly state that SADC and member states are to act in accordance with the values of human rights, democracy, and the rule of law (Article 4 (c) of the SADC Treaty reads, “SADC and its Member States shall act in accordance with the following principles: (c) human rights, democracy and the rule of law”) and that all Member States acceded to the jurisdiction of the Tribunal to hear such cases. The Tribunal therefore has the jurisdiction to entertain any human rights cases lodged by individuals against a member state (Human Rights Watch, 2010).

The issue of the application of the registration of the SADC Tribunal judgment was dismissed by the learned judge. He viewed the application to be contrary to public policy in Zimbabwe (*Gramara (Pty) Ltd and Cloete v The Government of Zimbabwe*, High Court 2010). The judge pointed out that the application depended on the facts of individual cases and the legal and practical consequences of recognising and enforcing such a decision and stated that the land reform program in Zimbabwe was a matter of public policy and the registration of the SADC Tribunal decision would have an overwhelming negative impact on agrarian reform in Zimbabwe (Munyoro, 2010). The registration of the SADC Tribunal decision would have had a negative impact on agrarian reforms. It is therefore submitted that the political implications that would result from the registration of the SADC Tribunal case far much outweighed the “rights” of farmers that had been affected by the farm invasions.

From the above outlined case analysis in this chapter, it is submitted that a number of Zimbabweans, especially white commercial farmers, have had their “rights violated” and have failed to seek any redress from the courts. In January, 2010, the Commercial Farmers Union (CFU) (Commercial Farmers Union of Zimbabwe, n.d.) revealed the numbers of farm workers and white commercial farmers who have been left homeless, jobless and “in poverty” as a result of the farm invasions (Magaramombe, 2009). In the eyes of imperialists, the High Court judgment can be viewed as failure by the judiciary to protect fundamental property rights of white

Zimbabweans and entrenched the future possibility of human rights abuses in Zimbabwe as the farm invasions were still a continuing trend (In a recent article the *Zimbabwe Online Newspaper* highlights the worsening fortunes of Zimbabwe's white farmers who have also come under increased attacks from farm invaders. A Magistrate in Harare gave four white farmers 24 hours to vacate their properties and ordered that should they fail to vacate their properties as ordered by the court they would spend the next two years in jail. <http://www.zimonline.co.za/Article.aspx?ArticleId=5642> (Accessed 28 January 2010)). However, what critics of the judgement fail to recognise is that when African indigenes were disposed of their land, they suffered immensely and still suffer to date. Such dispossession has impoverished many Africans who are yet to recover from the after effects of the colonial dispossessions.

Registration of the SADC Tribunal Judgments in South Africa

After the judgment in the Gramara case, action was launched in the North Gauteng High Court to register the decision of the SADCT and attach property belonging to the government of Zimbabwe so as to compensate farms who had lost their farms as a result of the FTLRP. In February 2010, the South African North Gauteng High Court ordered that the SADCT rulings against the seizure of farms in Zimbabwe should be registered, recognised and enforceable by the South Africa (*Louis Fick v Government of Zimbabwe* Pretoria High Court 7781/2009). The registration of the decision in South Africa was done in accordance with Article 32(3) of the SADC Protocol. The domestic legal basis for the registration was also justified under the Foreign Civil Judgments Act 32 of 1988 and the Recognition of Foreign Arbitral Awards Act 40 of 1997. The registration of the decision thus paved way for the attachment of Zimbabwean property in Zimbabwe.

The decision of the North-Gauteng High Court was challenged in the Supreme Court of Appeal (*Government of Zimbabwe v Fick and Others* [2012] (2012) ZASCA 122). The challenge by the government of Zimbabwe was premised on its sovereign immunity against suits in South Africa in terms of the Foreign Immunities Act⁸⁷ of 1981.

The government of Zimbabwe also contended that the SADCT lacked jurisdiction to hear the case brought to it and that the North Gauteng High Court (*Government of Zimbabwe v Fick and Others* [2012] (2012) ZASCA 122 para. 29) also lacked jurisdiction because the treaty and the Protocol were not approved by the South Africa Parliament (*Government of Zimbabwe v Fick and Others* [2012] (2012) ZASCA 122 para. 45).

In its judgment, Nugent JA in upholding the decision of the North-Gauteng High Court noted that Zimbabwe had waived its immunity by expressly submitting itself to the SADC Treaty and the Tribunal Protocol (*Government of Zimbabwe v Fick and Others* [2012] (2012) ZASCA 122 para. 20). The Supreme Court also dismissed the argument that the SADCT lacked jurisdiction on the basis that Zimbabwe's submission to the Tribunal's jurisdiction was sufficient for the purpose of the enforcement of the costs order in South Africa and thus dismissed the appeal by the government of Zimbabwe.

The government of Zimbabwe unsatisfied with the decision of the Supreme Court later appealed to the Constitutional Court (*Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC)). In its ruling the Constitutional Court developed the common law on the enforcement of foreign judgments and orders to apply to those of the SADCT (*Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) paras.49-70). Mogoeng CJ held that the High Court had correctly ordered that the costs order be enforced in South Africa (*Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) para.72). The Court noted that the development was provided for by the SADC legal instruments on the enforcement of the decisions of the Tribunal. The Constitutional Court thus ruled that Zimbabwe had failed to show that the High Court lacked jurisdiction to register the court order and thus dismissed the appeal with costs (*Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) para.73).

Operation *Murambatsvina* and Eviction Cases

The plight of the most indigent people in Zimbabwe about the lack of protection of their property rights is clearly highlighted in the cases relating to Operation *Murambatsvina*. The operation further heightened land seizures in Zimbabwe, as individuals were desperate for land. The launch of Operation *Murambatsvina* (clear or remove the filth) in 2005 resulted in the massive violation of citizens' legally protected rights, in particular socio-economic rights.

Operation *Murambatsvina* was launched in 2005. The operation was mainly targeted at the removal of informal settlements in all major urban and peri-urban areas in the country (Tibaijuka, 2005: 12). The aim of the government in launching this operation was to arrest disorderly urbanisation and to clamp down on illegal economic activities that had become a major characteristic of all urban areas in Zimbabwe (Tibaijuka, 2005: 12). On the other hand, it is believed that the operation was launched as a political tactic to get rid of urban voters who supported the opposition MDC party as the party had established its political stronghold in urban areas across the country). The operation was conducted with brutality, torture, beatings, killings, and the demolition of all informal structures (Centre for Housing Rights and Evictions *Operation Murambatsvina: Unlawful Forced Evictions; Crimes against Humanity; and Cruel Inhuman or Degrading Treatment of the Poorest of the Poor: Submission to the African Commission on Human and People's Rights 41st Session by Centre on Housing Rights and Evictions (COHRE)* (2007) 3). No prior consultations were made with the affected communities as the state haphazardly dispatched members of the army and police that oversaw the bulldozing, smashing and burning of structures that housed thousands of poor urban dwellers. Thousands of citizens including women and children were left stranded without protection, alternative accommodation, access to adequate water, sanitation and health care, and food (Tibaijuka, 2005: 31-45). The manner in which the operation was conducted violated international law on forced evictions (For guidelines to be followed in terms of forced evictions see Committee on Economic, Social and Cultural Rights General Comment 7 Forced Evictions, and the Right to Adequate Housing (Sixteenth

session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997). See also decisions of the African Commission in the case of *Social and Economic Rights Action Centre and Centre for Economic and Social Rights (SERAC) – Nigeria v Nigeria* African Commission on Human and Peoples’ Rights Decision 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights – Nigeria* (27 May 2002), Fifteenth Annual Activity Report of the African Commission on Human and Peoples’ Rights, 2001-2002, Done at the 31st Ordinary Session of the African Commission held from 2nd to 16th May 2002 in Pretoria, South Africa). No adequate notice was also given to affected individuals on the launch of the operation and neither were individuals given the time to regularise such legal structures as required under national law (See the Regional Town and Country Planning Act Chapter 29:12 in particular sections 27 and section 35 (2). Section 27 gives owners of properties that have not been regularised the time to effect the regularisation of such properties or to find an alternative place to reside in or operate from. The Act affords individuals to make applications to local authorities to have such informal properties regularised. Section 35 gives local authorities the power to remove, demolish or alter any existing building or stop any operations with or without payment of compensation. Before such removals or demolitions can be conducted, the local authority is required to serve written notice upon the owner of the development or any person to be affected by the proposed action (Harare High Court Case 2467/05 (Unreported)).

The legality of the operation was challenged without success as the courts sought to maintain and protect executive lawlessness. The attitude of the judiciary towards cases dealing with the operation clearly depicted the unwillingness of the courts to overturn arbitrary executive actions. This is mainly brought out in a number of cases that sought to challenge the legality of Operation *Murambatsvina* in 2005.

The case of *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development and Others* (Harare High Court Case 2467/05 (Unreported)) dealt with an urgent application seeking a provisional order that the residents of Hatcliffe Extension be allowed to return to their stands, that they not be

forcibly evicted from there, and a final order declaring that their forced eviction was unlawful. The basis of the application was that the Zimbabwean government had violated the Regional, Town and Country Planning Act Chapter 29:12 by giving zero to three days' notice to its citizens before the demolition of their homes and businesses (See section 32(3) of the Regional, Town and Country Planning Act which states that local authorities must wait at least thirty days after giving notice to demolish unregulated structures). The short to nonexistent time span between notice and demolition further deprived citizens of their right to petition the decision or to apply for a permit (Section 38 (1) of the Regional, Town and Country Planning Act guarantees all citizens the right to appeal the local planning authority's decision and apply for a permit within one month of receiving notice). The denial of due process thus, violated the Lancaster House Constitution (See section 16 of the Lancaster House Constitution, which protected citizens from deprivation of property without due process of law).

Karwi J, in his judgment ruled that the evictions were lawful and stated that a reasonable notice period had been given to the residents and that the residents were in breach of their lease agreements that they had entered into with the Ministry of Local Government by erecting unapproved structures. Karwi J reasoned that the public policy considerations in the destruction of the illegal structures far much outweighed the interests of individuals who were in contravention of the law (*Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development and Others* Harare High Court Case 2467/05 (Unreported)). It is clear from this decision that the ruling left the human rights of individuals exposed to violations as the lack of consideration of human rights issues in this case rubber-stamped the actions of the executive. It is submitted that it would have been appropriate in this case for the judge to enforce the obligation of the Zimbabwean government under its own domestic legislation, to give owners of property that have not been regularised the time to effect the regularisation of such properties and the time to find an alternative place to reside or operate from. Sadly, no alternative accommodation was provided and neither were the individuals afforded time to find alternative accommodation and

were thus forcibly evicted. It is submitted that since Zimbabwe has signed and ratified the International Covenant on Economic and Cultural Rights (ICESCR), the forced evictions were also in violation of its obligations under international law which obliges States to use “all appropriate means” to promote the right to adequate housing and to refrain from forced evictions without the provision of adequate protection (Article of the ICESCR states that, ‘The State parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realisation of this right, recognising, to this effect the essential importance of international co-operation based on free consent.’ Although not binding, General Comment 7 also lays down guidelines to be followed in cases of evictions. See Committee on Economic, Social and Cultural Rights General Comment 7 Forced Evictions, and the Right to Adequate Housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997). See also Article 17 (1) of the International Covenant on Civil and Political Rights (Zimbabwe has signed and ratified the treaty) which complements the right not to be forcibly evicted without adequate protection).

Ironically whilst ruling that the evictions were lawful the learned judge in his judgment went on to state that:

It would be naïve for me to conclude my judgment without mentioning the fact that the action taken by the respondents, however, has caused untold suffering to a number of people. I am told by the applicants that a lot of people have obviously been displaced and appear to have nowhere to go. Many have been sleeping in the open and in the cold weather. Many schoolchildren are not going to school. It is my considered view that, notwithstanding the fact that the action taken and the manner in which it was taken was lawful, hardships which have befallen the affected people would have been avoided by giving adequate notice to the affected people to relocate and re-establish themselves. A few days’ notice was not adequate in my view (*Dararemusha Cooperative v The Minister of Local Government, Public Works*

and Urban Development and Others Harare High Court Case 2467/05 (Unreported)).

The above statement by the judge in acknowledging that the forced evictions resulted in the violation of rights and his failure to use the law to protect such rights is also indicative of the attitude that the judiciary had adopted in human rights litigation in terms of rubber-stamping executive actions. It is mind boggling as to why the judge in this case would note that human rights violations occurred and not protect such rights. The clear disregard by the judge to notice that operation *Murambatsvina* was clearly carried out in a manner that violated national law and international law governing evictions clearly indicates a lack of impartiality. It is submitted that the lack of human rights protection contributed to the loss of trust and confidence by the public as human rights have continued to be violated with impunity with the judiciary rubber-stamping executive lawlessness.

Another case that sought to challenge the legality of Operation *Murambatsvina* was that of the *Batsirai Children's Care (BCC) v The Minister of Local Government, Public Works and Urban Development and Others* (Harare High Court Case No. 2566/05 (Unreported)). The case was a similar application to that of the *Dareremusha Cooperative v The Minister of Local Government, Public Works and Urban Development and Others* Harare High Court Case 2467/05 (Unreported) which sought to aver the violation of rights stipulated under that case). In this case, the BCC was an orphanage that looked after children, including those that had been orphaned by the HIV/AIDS pandemic. The orphanage was closed down after the infrastructure was demolished by members of the Zimbabwe Republic Police (ZRP). Children and staff were left homeless. As a result, an urgent application was filed for a spoliation order seeking that BCC be allowed to return to its property and carry out its business.

Hlatshwayo J continuously postponed the case and thus failed to grant the applicants a provisional spoliation order that would allow BCC to continue providing the services it rendered to the orphaned children. The continuous postponing of the case was done irrespective of the fact that the applicants had filed an urgent

application averring that their rights had been violated. Thus, the use of delay tactics in this case clearly revealed the lack of independence of the judicial system and the lack of impartiality of the judge to deliver a judgment that would be deemed to be against the ideologies of the government.

Other cases were also dismissed by the judiciary that sought to challenge the constitutionality of Operation Murambatsvina. These cases include that of *Antony Shumba v Officer in Charge, Norton Police Station, Commissioner of Police, Minister of Home Affairs, City of Harare and Minister of Local Government, Public Works and Urban Development* Norton Magistrate Court Case No. 376/05 (Unreported) and that of *Felistus Chinyuku and other Residents of Porta Farm v The Minister of Local Government and Urban Development* High Court No. 3225/05 (Unreported). The forced evictions in these cases were deemed lawful and thus a number of people were left homeless with no alternative accommodation being provided.

The judiciary thus adopted a passive attitude towards human rights, thus failing to protect citizens from arbitrary decisions of the executive (See also other cases relating to Operation Murambatsvina that were dismissed by the courts *Antony Shumba v Officer in Charge, Norton Police Station, Commissioner of Police, Minister of Home Affairs, City of Harare and Minister of Local Government, Public Works and Urban Development* Norton Magistrate Court Case No 376/05 (Unreported); *Felistus Chinyuku and other Residents of Porta Farm v The Minister of Local Government and Urban Development* HC No 3225/05 (Unreported)). This aspect was more emphasised by the former Under-Secretary-General of the United Nations, Anna Kajumulo Tibaijuka, who visited Zimbabwe to assess the impact of Operation *Murambatsvina* on human rights. She stated that:

There is a general concern that the High Court's failure to safeguard the right of the victims of the Operation reaffirms the argument that the Zimbabwean judiciary has generally failed to act and be seen to act as custodians of human rights in Zimbabwe and that there has been a regrettable failure by members of the bench to remain independent from the national and local politics of the day. The general view among many stakeholders is that this has had a severe impact on

the rule of law and the administration of justice, and has caused the ordinary person on the street to lose faith in achievement justice through legal channels (Tibaijuka, 2005: 62).

The failure of the judiciary for holding the executive accountable for violating international law principles on evictions also indicated that the judiciary had failed to apply principles of international law in trying to come up with reasonable and sound judgments in both cases discussed above (As stated earlier that although no constitutional provision exists giving the courts the opportunity to refer to international law in the interpretation of the Declaration of Rights, it would have been ideal in this case to make use of international law in interpreting the Declaration of Rights, thus holding the State accountable to its international obligation since it has signed and ratified the ICESCR and the ICCPR). The failure of the courts to seek guidance from international law clearly shows a clear departure from the judiciary under Gubbay CJ which relied greatly on international law in advancing the cause of human rights in the country. The fact that the judiciary allowed for such evictions to be carried out without the provision of any alternative accommodation, is deemed to be a foreign concept in South Africa as the judiciary has over the years outlawed evictions without the provision of any alternative shelter (See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W); 2006 (6) BCLR 728 (W); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* Case CCT 22/08 [2009] ZACC 16; *Minister of Public Works v Kyalami Ridge Association* 2001 (3) SA 1151 (CC)).

Conclusion

It is quite disheartening to note that there are views to the effect that the judiciary under the leadership of the then Chief Justice Chidyausiku failed to protect the property rights of several of its citizens in relation to the expropriation of land in Zimbabwe. The judiciary has an objective to uphold constitutional values and objectives. Land reform is one such important constitutional objective. The judgments handed down by the courts appeared to

entrench “human rights abuses” in farm invasions and displacements yet they also sought to address colonially induced injustices. The allegedly partisan nature of the judiciary resulted in individuals turning to regional courts and tribunals in order to have their “constitutional rights” protected. However, no constitutional rights are absolute. The exercise of one’s “constitutional rights” is weighed against other parties’ competing interests. This is well highlighted in the cases discussed in this chapter and despite judgments from regional courts and tribunals in favour of white farmers, the judiciary in Zimbabwe correctly remained adamant that the FTLRP was constitutional and thus never infringed to the constitutional rights of its citizens. It is therefore not surprising that the SADC Tribunal collapsed due to its evident failure to properly address the delicate issue of land reform. The Zimbabwean judiciary therefore did not fail to recognise and protect various fundamental rights, such as the right to property. Instead, it had to uphold constitutional values of restoration of land to the dispossessed Zimbabwean indigenes that lost their land to colonialists without any compensation. There was therefore no reason for those that unjustifiably benefitted from the unlawful deprivation of Africans’ land to expect compensation for returning what they had not transparently acquired in the first place.

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Indigenisation Jurisprudence and the Renewed Fight against “Fronting” to Advance Broad-based Black Economic Empowerment in South Africa: An Appraisal of the Broad-Based Black Economic Empowerment Amendment Act of 2013*

Tapina V. Warikandwa & Patrick C. Osode

Introduction

Over twenty years into South Africa’s democracy, the majority of its citizens are still excluded from the economic mainstream (Warikandwa & Osode, 2017). The exclusion of the majority of South Africa’s citizens from the economic mainstream has led to socio-economic imbalances. Such socio-economic imbalances have arguably been perpetuated by unethical business conducts and/or malpractices such as business fronting driven by the neoliberal economic agenda. As such, mechanisms have had to be employed to curb the rate of recurrence of incidents amounting to business fronting. Premised on the underlying principles of the distributive justice theory, a key mechanism to redressing colonial injustices, the Broad-Based Black Economic Empowerment Amendment Act (Amendment Act), was passed in 2013. Proceeding on the premise that the enactment of the Amendment Act is another deliberate governmental attempt to ensure greater success in realising the policy goals of the multi-faceted Black Economic Empowerment (BEE) programme, this chapter undertakes an evaluation of the Act’s provisions pertaining to “fronting” as a means to enlarging the place for an indigenisation jurisprudence in South Africa and the African continent as a whole.

* This book chapter is the revised version of a paper presented at the First Annual International Mercantile Law Conference held at the University of the Free State, Bloemfontein, on 6-9 November 2013.

It is without doubt that socio-economic imbalances reminiscent of the apartheid era (Examples of pieces of legislation which promoted socio-economic imbalances through the exclusion of blacks from mainstream economic activities during the apartheid era include the Bantu Building Workers Act 27 of 1951, which restricted blacks to doing skilled work in black areas only and not white areas; the Industrial Conciliation Act 28 of 1956 in which job reservations were made to the effect that specified work was an exclusive preserve of whites; and the Mines and Works Act 27 of 1956 in which blacks in the mining industry could not be awarded with a certificate of competency. See also Thomaz 2009 and Marais 2009) still characterise the contemporary South African society, and indeed the entire African continent, in which the majority of the citizens remain excluded from the economic mainstream, over 20 years into democracy (Warikandwa & Osode, 2017; Osode, 2010: 261). As such, in post-apartheid South Africa, special as well as robust mechanisms have had to be employed to try and remedy the socio-economic imbalances emanating from the past (Kalula and M'Paradzi, 2008: 108; Osode, 2004: 108; Southall, 2007: 83; Cheadle, Thompson and Hayson, 2005: 1). One such mechanism is the Broad-Based Black Economic Empowerment Act (See the Preamble of the Broad-Based Black Economic Empowerment Act 53 of 2003 (Hereinafter B-BBEE Act). The B-BBEE Act seeks to establish a legislative framework for the promotion of black economic empowerment). Under the provisions of the B-BBEE Act (See section 9 of the B-BBEE Act), the Minister of Trade and Industry promulgates B-BBEE Codes of Good Practice (See the Broad-Based Black Economic Empowerment Act (53/2003): Codes of Good Practice on Black Economic Empowerment No. 29617 issued in General Notice No. 112 of 2007. The Codes of Good Practice were issued to give guidance on company management's compliance with the B-BBEE Act through a scorecard mechanism) in line with the goals of broad-based black economic empowerment. The Broad-Based Black Economic Empowerment (B-BBEE) legal and institutional framework forms part of regulation of commercial activity in post-apartheid South Africa intended to scientifically/methodically pursue the goal of broadening and

maximising access to opportunities for participation in mainstream commercial activities for Historically Disadvantaged Individuals (HDIs) (See section 1(h) of the Preferential Procurement Regulations of 2001 pertaining to the Preferential Policy Framework Act No. 5 of 2000).

The underlying rationales of the B-BBEE programme from a historical perspective are therefore obvious. As such, in terms of methodology, a large part of the B-BBEE strategy consists of the granting of preferences to businesses based on the extent of black ownership and participation in management and control. However, progress towards attaining the goals of the B-BBEE Act have been curtailed by unethical and illegal business practices defined by cases of corruption and collusion in the corporate environment (Daly, 2003: 8). These unethical business practices are broadly called “fronting” (Pillay, 2010; Pinnock, 2013). They involve, *inter alia*, falsely misrepresenting the extent of black equity ownership and management influence in a company or promoting inexperienced and unskilled black people to senior management positions or employing them in such positions without allowing or requiring them to perform work or discharge responsibilities that are appropriate to such positions (Kalula and M’Paradzi, 2008: 128). Fronting can therefore be fairly described as a manifestation of regulatory subversion by industry and business interest groups who are amongst the intended primary targets of the BEE regulatory framework (Such an approach may be viewed as an inability to enforce accountability-related duties which are entrenched in a clear manner in the 1996 Constitution of South Africa by the post-apartheid era South African government and its functionaries. See Okpaluba, 2006: 248). Arguably, fronting might be one of the underlying reasons why there is a growing discomfort with the fact that the practice of black economic empowerment has thus far largely benefited a few prominent black people (Ncube, 2004: Foundation for Development of Africa 2004; The Mercury, 2013). Indeed the current picture suggests that the black economic empowerment (BEE) programme has not delivered on the policy goals intended for it (Andrews, 2008: 96; Zuma, 2013). It is fair to suggest that one of the reasons why the BEE project has fallen dismally short of its objectives is the

widespread nature of the said practice of fronting. After approximately 20 years of BEE policy or law making and implementation, the picture remains largely the same as it was in 1994. The majority within the black majority remain excluded from the economic mainstream (Bogopane, 2013: 277; Yokogawa South Africa (Pty) Ltd 2014). Fronting adversely impacts on the effective implementation of the B-BBEE Act and the B-BBEE Codes of Good Practice (Moloi, 2006: 32). This chapter is divided into five parts. The first part introduces the thesis of this chapter while the second part addresses the issue of fronting in the context of broad challenges facing the B-BBEE programme. Part three undertakes an assessment of the provisions of the Amendment Act. Emphasis in part three will be placed on the expansive scope of regulating fronting. Fronting is regulated in a combination of three ways namely definition, monitoring and consequences of non-compliance. Part four then points out how the Amendment Act has significantly changed the existing law and practice. Part five provides a conclusion to the thesis of the chapter.

Fronting in the Context of Broad Challenges Facing the Broad-Based Black Economic Empowerment Programme in South Africa

BEE is an initiative that aims at distributing economic benefits to a broad base of previously disadvantaged persons (Kalula and M'Paradzi, 2008: 108). The initiative will be properly regarded as broad-based when it has a wide span of beneficiaries and employs various methods to achieve its empowerment aims (Kalula and M'Paradzi, 2008: 109). Being an integrated socio-economic undertaking, BEE aims at remedying the inequalities characteristic of South Africa's past (BEE Commission, 2001: 2; Kalula and M'Paradzi, 2008: 108). The next section seeks to point out some of the challenges, which have been faced in attempts to pursue BEE objectives.

Broad Challenges

Under the current constitutional democracy of South Africa, the greatest challenge is to secure higher levels of economic justice through the enlargement of the participation of the black majority in the economy (Osode, 2010: 261). Unfortunately, fronting has emerged as a major barrier to the empowerment of the previously disadvantaged black majority (Kalula and M'Paradzi, 2008: 127). It is a cynical manipulation of regulatory requirements that amounts to defrauding the government and defeats the aims of BEE (Ibid: 128).

However, it has been argued that there appears to be too much emphasis on black affirmative action without acknowledging a need to balance such an approach with the interests of previously advantaged individuals who might have a key role to play in ensuring the success of the BEE programme in South Africa (Terblanche, 2013). This is a major criticism against the programme, which is primarily inspired by a widely acknowledged need for redistribution (Sairr, 2012). The critics contend that it would be far more effective if emphasis were placed on the development of new black-owned businesses (Mbeki, 2009. In his book titled *Architects of Poverty: Why African Capitalism Needs Changing*, the young brother to the former President of South Africa, Thabo Mbeki argued that: "...BEE 'strikes a fatal blow against black entrepreneurship by creating a small class of unproductive but wealthy black crony capitalists made up of ANC politicians'") and that it is regrettable that this makes up a relatively small element of the BEE programme. It is trite that the South African government has been unsuccessful in reducing poverty meaningfully through its redistribution policy stance over the past 20 years (BEE and other forms of redistribution move South Africa's growth rate to around the 3% a year, making it hard to break above that level. At this rate of growth, Gill Marcus, former governor of the South African Reserve Bank, noted, it will take a quarter of a century for the size of the economy to double. Through this long period, it will be the poor who pay the price for the hobbling of the country's great potential). In view of the redistributive character of BEE, it is likely to disappoint in its efforts to eradicate poverty, create employment and enhance economic growth (McNulty, 2010; Hill,

2010; Hill, 2009). Its redistributive nature will in all probability continue to benefit a small number of black business elite regardless of the legislative amendments (Mabanga, 2010; Naidoo, 2010).

Without an extensive investment in human capital, the BEE programme may follow the example of other South African redistribution policies by contributing towards a greater unequal distribution of income through the creation of larger income disparities within the black community. In this regard, it might be prudent for the South African Government to continue investigating alternative models and country experiences in its pursuit of the B-BBEE targets, which will eventually increase the participation of a substantial majority of black people in the economy.

Empirical study appears to suggest that BEE policies are not helping to attract foreign direct investment (FDI) into South Africa, and in fact, they might be causing a loss of investment, which in turn could nullify the potential gains from the B-BBEE programme (Mebratie and Bedi, 2014). It is in this regard that Makwiramiti contends that it is “imperative” for policymakers to review the BEE programme and the framework policies regulating FDI, with the intention of transforming them into a competitive advantage for South Africa (Makwiramiti, 2013). Questions though have to be raised regarding the net value of African countries’ continued reliance on FDI without placing emphasises on a need to grow infant industries and enlarging a place in their economies for value addition to raw materials for export purposes. It must be understood by African policy makers that whilst policies such as ownership equity, management control and employment equity are especially impacting on foreign companies’ willingness to make new investments in South Africa (Ibid) they are also crucial to African countries’ economic growth as evidenced by China’s approach to industrialisation. China has placed significance on growing its infant industries and is now a leading global economic actor with defined interests in the resource rich yet poor Africa.

Further, the continued lack of coherent definition of BEE measures distorts beneficiary groups and as a result has only served to enrich the politically connected elite. In its current form, it is patrimonial and also offers itself as an instrument for accumulating

patronage (Hauki and Engdahl, 2001; Mazibuko and Boshoff, 2003: 31). To the extent that the BEE programme might be impeding “foreign investment”, it may contribute to a widening premium to foreign ownership of firms (Southall, 2004: 313; Jackson III, Alessandri & Black, 2005). While foreign firms are questionably, exempt from the BEE ownership provision they are expected to comply with other elements including preferential procurement of inputs. However, Mebratie and Bedi show that after accounting for firm level fixed effects, foreign firms were not more productive than domestically owned firms in South Africa (Mebratie and Bedi, 2014: 18). Since FDI is considered to disproportionately favour more productive firms, and since there are no productivity premium to foreign ownership, compliance with BEE procurement measures is not likely to favour foreign firms *vis-a-vis* domestic firms (Ibid).

It is also worth pointing out that critics of the BEE consider the Amendment Act as not being appropriate in the current globalized world. For example, Afriforum claims that the Act is “a step in the wrong direction as it perpetuates the wrong focus of BEE legislation on ‘outcomes’ rather than ‘inputs’ such as education and training, which would address inequalities” (Afriforum, 2013; Penderis, 2009). The Skills Development element of the Codes of Good Practice attempts to address the educational and training aspects of economic empowerment for which Afriforum appears to be arguing. This chapter will discuss the challenges related to business fronting and evaluate the adequacy of the Amendment Act in efforts to curb the ills of such a practice. The next section discusses the fronting challenge in South Africa.

Fronting

The fronting challenge in South Africa was exacerbated by the fact that, until fairly recently, the courts had not definitively pronounced on government’s duties in responding to fronting practices but the opportunity arose in the landmark case of *Viking Pony Africa Pumps (Pty) Ltd v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (2) BCLR 207(CC) (Herein after *Viking Pony*). This case allowed the Constitutional Court to pronounce itself on, *inter alia*, the policy

rationales of BEE which it regarded as a constitutionally mandated governmental response to “one of the most vicious and degrading effects of racial discrimination in South Africa” being “...the economic exclusion and exploitation of black people” (*Viking Pony* case, para 1). The ruling of Mogoeng CJ in the *Viking Pony* case in effect, creates an obligation on an organ of state that has received a complaint about alleged fronting to properly investigate the complaint and to act accordingly (Ibid, para 17. The Constitutional Court held that one of the main issues for determination was the meaning of “detect” and “act against” in Regulation 15 of the Preferential Procurement Regulations No. 34350 issued in the Government Gazette of 8 June 2011. See also section 217 of the 1996 Constitution of South Africa, which provides that: “when an organ of state...contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.” See further *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) para 17-18; *Chairperson, Standing Tender Committee v JFE Sapela Electronics* 2008 (2) SA 638 (SCA) para 14; and *Tetra Mobile Radio (Pty) Ltd v MEC, Department of Works* 2008 (1) SA 438 (SCA) para 9).

The *Viking Pony* case not only sounds a warning to government entities to take action when fronting is suspected, it also makes it clear to private entities that the legislative tools created to combat fronting will now be more readily enforced. The position adopted by the Constitutional Court in the *Viking Pony* case has since been reinforced by the approach adopted by the Supreme Court of Appeal in the case of *Esorfranki Pipelines v Mopani District Municipality* (40/13) [2014] ZASCA 21 (28 March 2014) (This case dealt with the judicial review of administrative action in a tender process. The Supreme Court of Appeal declared a contract concluded pursuant to an unlawful tender award void and set it aside. It based its determination on the need for a just and equitable remedy in terms of section 8 of the Promotion of Administrative Justice Act 3 of 2000. Relevant considerations in this matter were that the municipality was found to have been biased in its decision to award the tender hence the successful tenderers were found guilty of fraud and fronting. See also *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd*

(CCT 39/10) [2010] ZACC 26 paras 83 and 84; *Chairperson, Standing Tender Committee & others v JFE Sapela Electronics (Pty) Ltd & others* 2008 (2) SA 638 (SCA) para 27; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province & others* 2008 (2) SA 481 (SCA) para 23; *Eskom Holdings Ltd & another v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9 and *Moseme Road Construction CC & others v King Civil Engineering Contractors (Pty) Ltd & another* 2010 (4) SA 359 (SCA) para 20; Quinot and Arrowsmith, 2013: 1; Arrowsmith, 1998: 3). The above appellate court judgements thus justify an evaluation of the definition of fronting and related regulatory provisions contained in the current BEE legal framework to determine their potential to ensure that all acts which may result in the continued exclusion of previously disadvantaged persons from the economic mainstream are eliminated or punished at law (It is in fact almost a decade now since some commentators opined that it is important to confront the challenges posed by fronting especially regarding its impact on the efficacy of B-BBEE programmes. See Kalula and M'Paradzi, 2008: 128). Focusing on fronting and related challenges, this chapter assesses the rationality, significance and potential effectiveness of the provisions or measures prescribed in the new Broad-Based Black Economic Empowerment Amendment Act No 46 of 2013 (hereafter, 'the Amendment Act') in an attempt to ensure greater success in realising the policy goals of the multi-faceted BEE programme. Inevitably, an evaluation of the relevant provisions of the Amendment Act is done with a view to assessing their prospects of making the BEE programme a success in the not-too-distant future.

Questions therefore arise as to whether or not the Amendment Act is the most appropriate legal instrument to address some of the challenges facing the BEE programme, especially fronting. With BEE fast becoming a preserve of the black elites, could the Amendment Act be the panacea that the ordinary and impoverished black majority have been waiting for to address the challenge of fronting or could it be another vain attempt at attempting to address the incurable?

An Assessment of the Provisions of the Amendment Act

Fronting in the Amendment Act is regulated in a combination of three ways; 1) definition, 2) monitoring, and 3) consequences. Fronting has often been used as a token of superficial inclusion of historically disadvantaged blacks into mainstream economic activities with no actual transfer of wealth or control (Mebratie and Bedi, 2014: 18). The provisions of the Amendment Act are intended to provide authoritative guidance as to what fronting is and prescribe deterrent measures against those who violate its provisions. This part examines the definitional issues relating to fronting and the potential impact of the Amendment Act in this regard.

The definition of “fronting”

The legislature has adopted a dual-faceted definition in section 1(e) of the Amendment Act. In assessing that definition for technical soundness and prospective regulatory efficacy, it is plausible to note that there are three possibilities or models in terms of approaches to statutory definitions of key terms. The legislature may: (a) Adopt a broad, elastic, open-ended, and catchall definition (usually accompanied by an element of vagueness); (b) Employ a closed-list or an open-list of practices or conduct or situations falling within the regulatory scheme; or (c) Adopt a combination of the above two approaches. This section analyses the statutory definition of “fronting” with a view to establishing its potential to address the challenges of fronting and related practices.

(i) First facet of definition: General description of what constitutes fronting

A holistic definition of fronting which goes beyond the 2011 guidelines to fronting (A detailed outline of what the guidelines on fronting practices provided for can be accessed at <http://www.beeonline.co.za/downloads/GuidelinesComplexstructuresFronting.pdf>. The South African Department of Trade and Industry introduced the guidelines with a view to ensuring that trade and industry focuses more on African, Indian and Coloured people who are the majority of the economically active population in South Africa. See also Burger, 2014.) was envisaged for the Amendment

Act in order to address matters related to the many forms of fronting in South Africa (See the Preamble to the Broad-Based Black Economic Empowerment Amendment Act (B-BBEE AA) issued in terms of General Notice No. 893 of 2011). In this regard, the Amendment Act makes certain significant changes to the provisions of the B-BBEE Act of 2003. Clearly, the legislative and policy intention is to eliminate the known and perceived weaknesses in the current BEE regulatory framework. Section 1(e) of the Amendment Act adopts a broad or general definition when it declares a ‘fronting practice’ as:

... a transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of [the B-BBEE Act] or the implementation of any of the provisions of [the B-BBEE Act]” (Section 1(e) of the proposed B-BBEE AA defines fronting as any “transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEE Act, including but not limited to practices in connection with the B-BBEE initiative...

The above definition addresses the issue of fronting by attaching a wide and elastic definition to the practice. Fronting as already alluded to is summarily defined by the Amendment Act as any action, which directly or indirectly undermines or frustrates the achievement of the objectives of the B-BBEE Act (Section 1(e) of the Amendment Act). At first glance, the nature of this definition may raise questions as to whether it is capable of providing a sufficiently clear and comprehensive guide to businesses and ordinary people by helping to identify fronting practices in all their manifestations. In this respect it is submitted that there will be uncertainty as to whether or not this ‘general principles’ facet of the definition can provide the required level of clarity in terms of both the wording and the breadth of the definition. However, it must be appreciated that the definition of “fronting” has to be interpreted within the context of the stated aims of the Amendment Act and related policies as a whole. Such interpretation would have to be alert to the broader context of the

potential and actual creativity, which would-be offenders can employ in trying to evade compliance with the laws relating to BEE.

It must be appreciated that the focus about the definition of fronting in the Amendment Act should not so much be about its vagueness, which on the face of it is readily recognisable as already stated above. Rather, the focus should be on the extent and the implications of vagueness for interpretation and the function (in this case the important positive value) of vagueness in certain areas of the law relating to BEE.

The need for clarity in legislative instruments does not require absolute certainty (*National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 48). The law simply must indicate with reasonable certainty to those bound by it what is required of them (*Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (*Affordable Medicines*) at para 108). Much has been written on the distinction between laws framed in clear and determinate language, and vague legislative provisions employing indeterminate terms like “reasonableness”, “fairness”, or “good faith” (Raban, 2010: 175; Schauer, 1991: 140; Scalia, 1989: 1175; Sustain, 1995: 1021. Though the law should strive to balance certainty and reliability against flexibility (Raz, 1972: 823, 841; Kaplow, 2000: 512-513; Posner, 1997: 101, 103), clear legislative provisions are bound to produce less certainty and predictability than vague provisions in many areas of the law (Raban, 2010: 177; For a comparative analysis see also Weber, 1978: 883; Hayek, 1960: 150; Bromley and Cochrane, 1995: 6). Due to the creativity and novelty of mechanisms likely to be employed by parties who seek to circumvent BEE policies and laws, an elastic “fronting” definition which is potentially vague and conceivably expands the coverage of the BEE legal framework to any practice or activity which may directly or indirectly undermine the thoroughgoing efforts to broaden and strengthen the participation of the hitherto excluded majority in the economic mainstream is highly plausible. Clearly, the first facet of the fronting definition is intended to serve as an omnibus clause able to cover fronting practices that are not otherwise specifically included within the ambit of the Amendment Act.

Even if the “fronting” definition were to be regarded as vague, context sensitivity in its interpretation allows for the process of concretisation to take effect (Botha, 2005: 95). Concretisation refers to a process in which there is the correlation, harmonisation, realisation and actualisation of a statute (See also Du Plessis, 1986: 149). Concretisation allows the interpreter to move from the abstract to the practical reality concerning “fronting”. It is during the process of concretisation that the abstract definition of “fronting” and the purpose of the definition will be correlated with the concrete facts of the negative effects of the historic economic exclusion of the previously disadvantaged majority and the underlying policy intent behind the BEE legislative framework and guidelines that a context-specific determination of fronting will be made (Such an approach can be easily established in the role adopted by the Constitutional Court before the passing of the Amendment Act, in the *Viking Pony* case and recently the *Esorfranki Pipelines* case in which the background of the dismantling of apartheid policies informs the courts’ resolve to minimise the incidence of business fronting in South Africa). This approach will be consistent with a purposive interpretation (Du Plessis, 1986: 143). Du Plessis plausibly points out that the purposive viewpoint of statutory interpretation acknowledges courts’ creative law-making role. However, this does not mean that the courts take over the legislative powers of the legislature) of the definition of fronting under the Amendment Act.

Furthermore, the definition of “fronting” within the Amendment Act lends itself to being developed or strengthened by the courts on a case-by-case basis but within the aims, purport, spirit and objectives of the Constitution as well as BEE policies and laws. This is a commendable feature of the definition given that it sometimes happens that the goal of social and economic changes is reached more quickly through legal development by the judiciary than the legislature (*Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) 597 I-J/598 A-D. See also *Zimmat Insurance Co Ltd v Chawanda* 1991 (2) SA 825 (ZSC) 832 H-I).

(ii) *Second facet of definition: Practices specifically identified as “fronting”*

The challenges identified above as being likely to result from the element of vagueness inherent in a broad definition of “fronting” are certain to be mitigated by the second facet of the definition of “fronting” in the Amendment Act which explicitly identifies certain specific conducts as constituting fronting. This part of the definition section 1(e) declares “fronting practice” as:

... including but not limited to practices connected to a B-BBEE initiative –

a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise; or

b) in terms of which the economic benefits received as a result of the broad-based black economic empowerment status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation (*Additionally, section 1(e)(c) provides that fronting includes practices in connection with a B-BBEE initiative: involving the conclusion of a legal relationship with a black person for the purpose of the enterprise achieving a certain level of B-BBEE compliance without granting the black person economic benefits. Lastly, Section 1(e) (d) provides that fronting includes practices in connection with a B-BBEE initiative: involving the conclusion of an argument with another enterprise in order to achieve or enhance B-BBEE status in circumstances in which i) there significant limitations on the identity of suppliers...ii) maintenance of business operations ...is reasonably considered improbable and iii) the terms and conditions were not negotiated...on a fair and reasonable basis).*

This part of the definition commendably attempts to go beyond the broad/general description of “fronting” provided in the first part of section 1(e). It is especially significant that the legislature in section 1(e) used the words “including but not limited to”. The use of these words raises an important aspect regarding the character of definitions sometimes adopted by the legislature. Where drafters of regulatory legislation are faced with the challenge of constructing a definitional net that will capture particular forms of misconduct, they usually adopt two types of definitions, the “inclusive” and “exclusive”. The “inclusive” definition aims to specifically cover all

the known forms of the relevant conduct or practice while leaving space for both regulators and adjudicators to bring within the ambit of the definitional provision forms or manifestations of the conduct or practice that were unknown at the time of drafting, debating and enacting the particular legislation (*N.D.P. Namboodripad v Union of India* (2007) 4 SCC 502. See also *Hamdard (Wakf) Laboratories v Deputy Labour Commissioner* (2007) 5 SCC 281). An “exclusive” definition on the other hand provides an exhaustive meaning or “closed list” in relation to a term and does not permit any meaning or the inclusion of anything that is not expressly captured in its wording (*Bharat Cooperative Bank (Mumbai) Ltd. v Employees Union* (2007) 4 SCC 685. See also *Himalayan Tiles and Marble (P) Ltd. v Francis Victor Coutinho* (1980) 3 SCC 223).

Therefore, whilst on the face of it the part of the fronting definition which identifies certain specific conducts or practices as “fronting” may appear not to be exhaustive, the use of the words “including but not limited to” suggests that the definition is “inclusive” and, therefore, inherently elastic. When a definitional provision uses the said words, it is *prima facie* extensive and enlarges the meaning of the expression defined so as to comprehend not only such things as they signify according to their natural import but also those things which the provision expressly includes (*Dilworth v Commissioner of Stamps (Lord Watson)* (1899) AC 99. See also *Mahalakshmi Oil Mills v State of A.P.* 1989 AIR 335).

However, a leading commercial law commentator, Levenstein, has undertaken a study on BEE related fronting practices. In the study, Levenstein identified numerous fronting practices such as the following: 1) apparent ignorance fronting, 2) sector code fronting, 3) holding company fronting, 4) exempt micro enterprise fronting, 2) similar name fronting, 3) apparent ignorance fronting, 5) holding company fronting 6) sector code fronting, 7) ownership fronting, 8) trust fronting, 9) management and employment equity fronting, 10) skills development fronting, 11) procurement fronting, and 12) enterprise development fronting (Levenstein, 2013).

The common fronting practices identified by Levenstein could also be outlined as follows:

- 1) Forged certificates bearing names of well-known verification agencies;
- 2) The use of unaccredited verification agencies;
- 3) Opting to use the BEE codes of good practice rather than the sector codes;
- 4) Using old or future financial year data to ensure that one's turnover comes in below the threshold for generic codes or qualified small enterprises codes;
- 5) Using employee trusts where the ultimate beneficiaries are not black people;
- 6) Putting employees into positions where they do not hold similar responsibilities or get similar rewards to white people in the same positions;
- 7) Misrepresenting training costs. For instance, counting Seta grants as training spend, or counting training done by labour brokers or creating a training expense such that the learner then either does not attend or has a fabricated invoice; and
- 8) Misrepresenting procurement spend by counting imports or by using invoices from a supplier BEE shell company to derive an inflated score or counting a third party's BEE status. A common example is where a company that spends money on its credit card applies the bank's BEE status, instead of looking at the BEE status of each individual supplier (Timm, 2013).

Leventsein's study provides a broader coverage of specific fronting practices which offers the public greater guidance regarding the potential scope of "fronting" in comparison to sections 1(e) (a)-(d) of the Amendment Act. Given that Levenstein's study provides a significantly longer and more enlightening list of forms of "fronting", it is submitted that there is room to enlarge the number of specific types of fronting outlined in sections 1(e)(a)-(d) of the Amendment Act. Whilst not constituting a closed list of what fronting may be the list provided in section 1(e)(a)-(d) is inadequate when one considers the threat posed by "fronting" to the genuine challenge of increasing the participation of the previously disadvantaged majority in the economic mainstream of South Africa (Ibid. Levenstein identifies a list of fronting practices which are as follows: 1) exempt micro

enterprise fronting, 2) similar name fronting, 3) apparent ignorance fronting, 4) holding company fronting 5) sector code fronting, 6) ownership fronting, 7) trust fronting, 8) management and employment equity fronting, 9) skills development fronting, 10) procurement fronting, and 11) enterprise development fronting amongst others). Legislation must be drafted in such a way that the readers know what the law expects from them (Botha, 2005: 28. See also *Affordable Medicines* at para 108. See also *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 100 and *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) (*South African Liquor Traders*) at para 27; *Union Government v Mack* 1917 AD 419; *Volschenk v Volschenk* 1946 TPD 486; *Association of Amusement and Novelty Machine Operations v Minister of Justice* 1980 (2) SA 636 (A) and *Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A)). In that regard sufficiency and precision are essential criteria for a legal regulatory instrument (*Mail & Guardian and Others v Chipu N.O. and Others* 2013 ZACC 32 Case CCT 136/12 paras 64-65). Accordingly, the specific fronting types provision in the definition section can be strengthened by including more specific forms of fronting similar to those identified by Levenstein in order to maximise guidance on the nature and scope of fronting in South Africa. This is an issue, which lawmakers ought to consider in the next round of law reform relating to the BEE legislative and policy framework.

iii) Strengthening the monitoring and evaluation of compliance with the B-BBEE Act

The Amendment Act creates a Broad-Based Black Economic Empowerment Commission (B-BBEE Commission) which will effectively act as an ombudsman for matters relating to the B-BBEE Act (Section 8 of the B-BBEE AA. Under this provision, section 13B is inserted into the B-BBEE Act to provide for the establishment and status of the B-BBEE Commission). The B-BBEE Commission will be established as a juristic person charged with the responsibility of providing oversight to the B-BBEE process and has the duty to:

investigate cases of fronting and BEE-related complaints as well as receive and monitor reports on BEE from organs of state and listed companies (Section 13B of the B-BBEE Amendment Act). This commission is the institutional focus of the Amendment Act changes which if well implemented could provide stronger leadership to the BEE process, which has historically been sorely lacking (Thomaz, 2009. See also Planting, 2010).

The functions of the Commission will include overseeing general compliance with the B-BBEE Act, the making of determinations regarding fronting practices in B-BBEE transactions, receiving and investigating complaints relating to the B-BBEE Act, maintaining a registry of major B-BBEE transactions and promoting the advocacy of B-BBEE initiatives (See section 13F of the B-BBEE Act and is titled “Functions of Commission”). The Amendment Act arms the Commission with powers which include the power to appoint a special investigations unit to assist the Commission in respect of investigations into B-BBEE compliance and contraventions (See section 13 J of the B-BBEE Act and is titled “Investigations by the Commission”). The establishment of this Commission is in line with the Department of Trade and Industry’s new strategy of heavily policing the B-BBEE verification industry in future and businesses will have to ensure that their BEE policies and especially ownership structures are in line with the objectives of the B-BBEE Act (Ibid, Section 13J).

Should the B-BBEE Commission be as effective as the South African Competition Commission (The South African Competition Commission was established in terms of section 19 of the South African Competition Act 35 of 1999. Anecdotal evidence from the experiences of the Competition Commission and the Enforcement Committee (Established in terms of the Financial Services Board Act 97 of 1990) suggests that the BEE Commission might just work. However, there might be a need for adding more legislative functionaries beyond the existing proposed structures for purposes of efficiency) which has led to South Africa being ranked 8th out of 148 countries in the world regarding the soundness of its competition policies by the World Economic Forum, then the BEE Commission might just be what South Africa needs to combat fronting and related

illicit or unethical business practices (See the 2013-2014 World Economic Forum Global Competitiveness Report). Perhaps the only criticism that could be levelled against the Amendment Act in this respect is that unlike the Competition Commission which is backed by a Competition Tribunal (Section 27 of the Competition Act) and a Competition Appeal Court (Section 36 of the Competition Act), the proposed BEE Commission, regardless of its key role, does not have auxiliary judicial or quasi-judicial structures or functionaries that could augment the performance of its functions. For a key commission meant to address a fundamental aspect of justice and equity regarding socio-economic matters in South Africa, the isolated nature of the BEE Commission might be a legislative oversight which calls for urgent redress (The idea of a BEE Commission arose out of a resolution taken at the Black Management Forum (BMF) National Conference in Stellenbosch, from 14 to 15 November 1997. The prevailing view at the Conference was that black people should direct and take charge of a new vision for BEE, a process that, until then, had been conceptualised, controlled and driven by the private sector. The motivation for the establishment of the commission is that the notion of true empowerment as defined by black people does not exist, nor does a common definition or benchmark which serves as minimum requirement. Many deals are concluded by organisations, including Government structures that fall far short of recognising the true aspirations of the marginalised black majority all in the name of Black Economic Empowerment).

Further, the Amendment Act designates the magistrate's courts as the courts of first instance regarding cases of alleged fronting activities. It is trite that the Magistrate's Courts are inferior courts, which deal with simple civil and criminal matters and have a limited monetary jurisdiction. However, fronting often deals with complex practices involving substantial sums of money. It is therefore submitted that the Magistrate's Court is not the most appropriate judicial forum to deal with commercial wrong doings of this nature and magnitude. This conclusion is also supported by the real possibility that cases of fronting will be caught up in the existing backlogs in the Magistrates' Courts, which in fact may trivialise the

significance and impact of the harm done by fronting to the prospects of successful implementation of the BEE programme.

iv) Offences and penalties

The Amendment Act makes provision for a number of offences and associated penalties (See sections 13N, 13O and 13P of the B-BBEE Act, titled “Offences in connection with Commission”, “Other offences and penalties” and “Prohibition on business with organs of state following conviction under this Act”). It creates an offence for intentional misrepresentation of information for purposes of securing a favourable B-BBEE status, providing false information to a Government entity and failure by a public officer to report any offence in terms of the B-BBEE Act (Section 13N). The Amendment Act also prescribes the imposition of stiff penalties on persons found guilty of any offence under the Act. A person convicted in terms of the Act could be liable to a fine or imprisonment of up to ten years (Section 13O(3) (a)-(b)). In respect of juristic persons, the quantum of the fine could be fixed at up to a maximum of ten percent of such juristic person’s annual turnover (Section 13O(3)(a)). In addition to the above penalties, any person convicted of the previously mentioned offences will be banned from further contracting with any Government entity and will be entered into the Register of Tender Defaulters (Section 13P. Due to the fact that there is a lot of room for corruption when government tenders for goods or services, the Prevention and Combating of Corrupt Activities Act 12 of 2004 requires the Minister of Finance to create a Register of Tender Defaulters, which aims at addressing such incidents of corruption. The register is kept by the National Treasury. Should a person or business be convicted by a court of law of crimes involving contracts or tenders, their names and details are recorded in this Register together with the details of the crime committed. This creates an additional penalty for the offenders). It is only time that will tell whether the definition of “fronting” in the Amendment Act will provide maximum deterrence against fronting and related malpractices.

How the Amendment Act has Changed Existing Law and Practice

The Amendment Act has brought significant changes to the B-BBEE Act and Codes. The changes evidently signify the South African government's political will and commitment towards ensuring the promotion, implementation and achievement of the objectives of the BEE programme. The fundamental nature of the BEE is to create jobs, promote skills development, promote entrepreneurship and create business opportunities for all South Africans (See the Preamble of the Broad-Based Black Economic Empowerment Act 53 of 2003. See also the 2004 Report by the Black Economic Empowerment Commission; Kloppers, 2014: 58; Ponte, Roberts and Van Sittert, 2007: 936; Albertyn, 2010: 6). Having been largely voluntary in nature under the previous regulatory framework, the current dispensation ushered in by the Amendment Act introduces penalties for non-compliance with the BEE laws (See sections 13O and 13P of the Amendment Act). The South African government's policy in the previous BEE regulatory framework could be labelled as voluntary in nature in that firms applied B-BBEE laws subject to firm specific business needs (See section 10 of the B-BBEE Act 56 of 2003. See also Levenstein, 2013). The B-BBEE framework was thus merely a mechanism or methodology to measure a company's B-BBEE rating (See section 13O(3) (a)-(b) of the Amendment Act). However the Amendment Act has brought a significant departure from the previous government policy in that criminal offences for misrepresenting or providing false information regarding a company's BEE status or engaging in business fronting would result in a fine and/or 10 years imprisonment for individuals with the firm being fined 10% of its annual turnover (See section 13O(a) of the Amendment Act). Further, there would be a possibility of being banned from contracting with the government and public entities for ten years (See section 13P(1) of the Amendment Act).

The legislative amendments have thus created a statutory right for the government and public entities to allow them to cancel/revoke any contract or authorisation awarded due to false information on the B-BBEE status of a firm (See sections 13A and

13O(2) of the Amendment Act). Another obligation was imposed on the government and public entities to take Codes into account in their procurement policies and in issuing licences and authorisations (See section 6 of the Amendment Act). In the previous legislative dispensation, no such obligation existed with the same parties being required consider Codes only “...as far as reasonably possible” (See section 10 of the B-BBEE Act 56 of 2003). Yet another obligation was imposed on South African listed entities to provide a report to the B-BBEE Commission on their compliance with B-BBEE (See section 6(4) of the Amendment Act). Revised B-BBEE points have far-reaching implications for business especially for companies whose customers require a minimum B-BBEE status from suppliers, for entities with contractual or other obligations to maintain a minimum B-BBEE status for ownership fulfilment and for firms with government licences, permits, or other authorisations requiring a minimum B-BBEE status. As such, firms have to renew their current B-BBEE strategy to assess the impact of these changes and take steps to try to maintain their existing B-BBEE ratings (See section 7 of the Amendment Act).

The Amendment Act also takes precedent over any Parliamentary Act regarding BEE matters. For example, the Amendment Act over-rides the Mining Charter where 25.1% black ownership is required with the mining industry not having a scorecard as such (Media Reporter, 2015). Levenstein has argued that the new codes which came into effect on the 1st of May 2015 were open to different interpretations as they were poorly written and allowed room for misrepresentation (Ibid. See also Lund, 2015; Steyn, 2015; and Hill-Lewis, 2015). However, as at present the Department of Trade and Industry is yet to take action against any person or organisation regarding fronting practices. As such not much can be learnt from the shortcomings of the codes as yet.

Conclusion

South Africa’s BEE policy is not simply a moral initiative to redress the wrongs of the past. From a policy perspective, it is a pragmatic strategy aimed at realising the country’s full economic

growth potential while helping to pull the black majority into the economic mainstream. The domination of business activities by “minority” entities coupled with the continuing exclusion of the South African majority from the mainstream of economy should be a great cause for concern for supporters of the reconstruction and development process. The B-BBEE policy envisions the creation and development of new enterprises that produce value adding goods and services; attract new investment and employment opportunities with the aim of redistributing wealth and ensuring racial inclusivity in the economy. The fundamental pillars of company transformation include ownership, management control, employment equity, skills development, preferential procurement, and enterprise development (Sartorius and Botha, 2008: 437. According to Sartorius and Botha, BEE has led to a gradual increase in the black middle class, while ownership of capital on the Johannesburg Stock Exchange (JSE) has, as at 2008, grown due to direct intervention through BEE industry charters, and legislative measures). In that regard, it is argued that the amendments to the B-BBEE Act are a welcome reinforcement of the pertinent legal and institutional framework. If effectively implemented, the amendments should improve the current state of affairs in which fronting is widespread and BEE appears to be serving the best interests of only a small number of well-connected business elites (Heil, 2012).

The Amendment Act introduces substantial policing ability and penalties in addition to providing a wide-ranging and flexible definition of fronting. The Amendment Act is a welcome piece of legislation, as the BEE landscape sorely needs protection from abuse (Schnehage, 2013; Ensor, 2013; Dhliwayo, 2012). The multiplicity of the known forms of fronting coupled with the ingenuity with which currently unknown forms of the practice can be developed by business people justify the vague or broad definition of “fronting” in the Amendment Act. Without a doubt, a closed list of fronting practices, whilst allowing for easy identification of illegal practices related to the BEE programme, would have provided ample room for would-be offenders to circumvent the law. The legislature should therefore be applauded for shunning the idea of adopting a closed list. The broad definitional provision will allow for a wider judicial

reading of the term “fronting” to include conduct and practices, which the lawmakers might not have thought of at the time of legislating but which by their nature fit into the construction or definition of “fronting” as a business strategy. This approach is both important and plausible when one considers the long history of the exclusion of the majority in South Africa from the economic mainstream.

It may be fair to conclude that to a certain extent the Amendment Act systematically tackles some of the most critical challenges facing the implementation of the BEE programme and must therefore be commended as a sound legal instrument for advancing the inclusive participation of black people in the mainstream of South Africa’s economy. Overall, what is significant in pursuing BEE objectives is to understand that, “BEE deals must make business sense; business deals must make BEE sense, yet above all one must make profit” (Levenstein, 2013).

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Analysis of the Namibian Superior Courts' Judgements on the Action for Adultery against a Third Party: The Implications on African Customary Laws and Jurisprudence

Eugene Lizazi Libebe

“Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh” Genesis 2:24.

Introduction

The position of Namibia's superior courts is that the courts will no longer award damages on a claim based on adultery for loss of consortium and contumelia. The reasoning of the courts in the judgements includes that this claim has lost its lustre in the modern day and it is inconsistent with Constitutional values and norms, therefore it is no longer sustainable in our law. This chapter is an analysis of the courts' reasoning, and the implications of the judgments on customary laws, the family as a fundamental unit of society and African jurisprudence. It is argued that the courts failed to take cognisance of African history, customary laws, norms, values, morality, and philosophies in an effort to go beyond jurisprudential mimicry of Western jurisdictions. Further, the interpretation taken by the court fails to protect the family as a cornerstone and fundamental unit of society. It is suggested that the courts should rather craft a balanced and harmonious approach, instead of abolishing the claim in totality. The judgments have a potential to open floodgates for adultery, as well as undermine the fundamentality of the family unit and the development of African family law or jurisprudence.

In mid-2016, both the Supreme Court and High Court of Namibia delivered judgements in which their reasoning was poised with the abolition of the award of damages based on adultery. The

Supreme Court case of *James Sibongo v Lister Lutombi Chaka & another* Case No: SA 77/2014 [*Sibongo case*] was delivered on 19 August 2016, and the High Court case of *Van Straten v Bekker* (I 6056-2014) [2016] NAHCMD 243 (25 August 2016), Case No. I 6056/2014 [*Bekker case*] was subsequently delivered on 25 August 2016. The Supreme Court concluded that the award of damages in action for adultery against a third party was no longer sustainable in our law. The High Court also stressed that the action has lost its lustre in the modern day and there are winds of change that are currently blowing in some jurisdictions such as South Africa. A judgement of the Constitutional Court in South Africa, upholding a judgement of the Supreme Court of Appeal of that country, held that no damages should henceforth be recoverable from a third party for adultery (*RH v DE* 2014 (6) SA 436 (SCA)).

The next sections of this chapter will look closely at the two judgements of Namibia's highest courts on the claim for damages based on adultery. It will further analyse the reasoning in the two judgements, and their implications on African customary laws and the development of African family law and jurisprudence. It is argued that the judgements have repercussions on the fundamentality and protection of the family unit and fails to adopt a unique or balanced approach to address the shortcomings of the action rather than abolish it. It is vital for our courts to embrace diversity, and to never disregard the real values, norms, mores, aspirations and legal convictions of most African people embedded in their conscience, cultural practices, socio-legal theories or institutions and philosophies. Judges, when developing the common law and interpreting the Constitution, should take into consideration these multiple factors. In doing so, the courts will reduce conflict between the Constitution and customary laws, and cultivate or nurture Afro-centric jurisprudential developments and judicial activism from an Afro-centric vantage point. This chapter therefore critically analyses the reasoning of the courts in the two judgements and their implications on customary laws and the development of African jurisprudence.

The Supreme Court Decision

The appellant [cited as the second defendant] was in an action for damages for adultery brought against him by the respondent as plaintiff (*The Sibongo case*). This claim was introduced as part of a divorce action between the plaintiff and the first defendant. The plaintiff instituted a divorce action against the first defendant on 1 July 2011. On 26 September 2012, the plaintiff amended his claim to join the second defendant and introduced a claim against him of committing adultery with the first defendant. In it, the plaintiff claimed N\$100 000 in damages against the second defendant. It was broken down as N\$50 000 claimed for *contumelia* and N\$50 000 for loss of ‘consortium, society and services’ of the first defendant (*Sibongo case*, para. 3).

After a date for the hearing of the appeal was allocated, the parties were requested to address both written and oral arguments on the question as to whether the first respondent’s delictual cause of action for adultery pursued against the appellant was still sustainable in law (*Ibid*, p. 5). The issues to be determined by the court were thus whether the first defendant could give evidence against the plaintiff in respect of the claim against the second defendant and secondly whether the claim itself is still sustainable in law (*Ibid*). Both parties filed detailed written heads of arguments on the issue in advance of the hearing. Both parties referred to recent authority of both the South African Supreme Court of Appeal (SCA) in *RH v DE* 2014 (6) SA 436 (SCA) and the further appeal in that matter to that country’s Constitutional Court in *DE v RH* 2015 (5) SA 83 (CC). The question posed by these courts concerns the continued existence of the delictual action of adultery.

The Supreme Court in the *Sibongo case* [with reference to the South African judgements above] stated that: the *boni mores* of society or the legal convictions of the community, which in effect constitute expressions of considerations of legal and public policy, are of particular significance in determining wrongfulness, which is an essential of element delictual liability in our law, both under the *lex Aquilia* and the *actio injuriarum* (*Sibongo case*, p. 9. In *Le Roux v Dey* (*Freedom of Expression Institute and Restorative Justice Centre as Amici*

Curiae) 2011 (3) SA 274 (CC) (2011 (6) BCLR 577; [2011] ZACC 4) para 122 the principle was formulated thus: “*In the more recent past our courts have come to recognize, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether — assuming all the other elements of delictual liability to be present — it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.*”). This means that in determining whether conduct should be regarded as wrongful, i.e. whether delictual liability should follow, courts are more sensitive to the dynamic and changing nature of the norms of our society (Ibid).

The court in *Moolman & another v Jeandre Development CC* (Case No SA 50/2013, 3 December 2015 at paras 63-67), raised the question as to whether a contract enforced in the High Court was indeed enforceable on the grounds of being against public policy. After inviting and receiving argument on the issue, the court in *Moolman* found that the contract in question was unenforceable as being against public policy (Ibid, para. 74). Further, the court in *Moolman*, held that public policy, embodying the legal convictions of the community, is to be determined with reference to the values and norms embodied in the Constitution. Public policy also informs the element of wrongfulness in delictual liability. This was also acknowledged by this court in the context of the *Aquilian* action (See *Barkhuizen v Napier* 2007(5) SA 323 (CC) paras 28-29. See also *Brisley v Drotsky* 2000(4) SA 1 (SCA).

After a detailed analysis of the action in common law – its origin and development – and after a thorough comparative survey, the Court in *RH v DE* concluded that: ‘*. . . in the light of the changing mores of our society the delictual action based on adultery of the innocent spouse has become outdated and can no longer be sustained — that the time for its abolition has come*’ (*RH v DE* 2014 (6) SA 436 (SCA) para 40). The Supreme Court in the *Sibongo* case reached the same conclusions like the South African superior courts that the action was no longer sustainable and must be abolished by our courts.

The High Court Decision

In *Van Straten v Bekker* the action was a claim instituted by the plaintiff for payment of damages by the defendant, based on allegations that the latter has been and continues to commit adultery with the plaintiff's spouse since July 2014 in Walvis Bay. In the particulars of claim, the plaintiff seeks payment of an amount of N\$ 100,000 being N\$ 50 000 for *contumelia* and the balance being in respect of a claim for loss of comfort, society and services of her spouse (*Bekker case*, para. 4). The court *mero motu* requested the plaintiff's legal practitioner to address the court on whether the courts in Namibia should continue awarding claims such as that prayed for by the plaintiff. This question arose as a result of the winds of change that are currently blowing in some jurisdictions, including our neighbour South Africa, with whom we share a lot in terms of legal heritage. There are a number of cases in the Namibian jurisdiction in which the courts have dealt with the twin claims of *contumelia* and loss of comfort and society (Ibid, para. 22).

In *Van Wyk v Van Wyk* ((I 3793/2012) [2013] NAHCMD 125 (14 May 2013)), the plaintiff sued the second defendant for adultery and loss of comfort and society. The plaintiff alleged that the second defendant had had sexual intercourse with her husband knowingly and in total disregard of the matrimonial status and as a result of which she lost the love and affection from her husband. It was proved in evidence that the second defendant went on a provocative spree, amongst other things and sent provocative and hurtful messages to the plaintiff about her relationship with the latter's husband (Ibid). 'She sent messages to the effect that the plaintiff was on account of her weight and size a 'full moon' which caused the first defendant to be interested in her because she was 'sexy and had an ass that drives him crazy'. She also said, to rub salt to injury, 'that which you get, I also get LOL' (Ibid). The court found this behaviour distasteful and a desecration of the marriage institution, particularly considering that the second defendant had attended the parties' wedding and therefore knowingly had sexual intercourse with the plaintiff's spouse. The court also found that as a result of the second defendant's actions, the plaintiff had lost the comfort and society of

her husband and therefore awarded the plaintiff N\$ 20 000 in respect of each claim (Ibid).

Similar cases that dealt with the issue of *contumelia* and loss of consortium include *Useb v Gawaseb* ((I 1625/2012) [2014] NAHCMD 283 (1 October 2014)); *Jaspert v Siepker* ((I 670/2012) [2013] NAHCMD 267 (30 September 2013)); *Mathews v Ipinge* (2007 (1) NR 110 (HC)); *Burger v Burger and Another* ((I 3742/2010) [2012] NAHCMD 15 (10 October 2012)). The High Court of Namibia appear to have been granting damages in appropriate cases where it was found that adultery has taken place and where loss of comfort and society is proved as a result of the adultery (*Bekker case*, para. 23). The High Court in *Bekker case*, like the Supreme Court in *Sibongo case*, concluded that the action of *contumelia* and loss of consortium has lost their lustre and were no longer in consonance with Constitutional values. However, adulterous conduct is no doubt a desecration of the marriage institution. A total disregard of the action based on adultery is and will be a desolation to the family unit, African social theory and *Ubuntu* embedded in the sanctity of marriage.

An Overview of the Action for Adultery against a Third Party

The action for adultery is part of a group of actions, based on the action *iniuriarum*, which are connected to the institution of marriage. The group also comprises the action for breach of promise to marry. From a historical perspective, Roman law punished adultery as a crime but did not afford an action in private law (Carnelley, 2013). As to Roman Dutch Law, support for the proposition that Roman Dutch law afforded a private law action for adultery, is hard to find amongst our old authorities (See in *RH v DE*, para. 22). The action for adultery against a third party has its origin in an archaic English action called criminal conversation, which was abolished in England in 1970 (Ibid, para. 26. See also *Pritchard v Pritchard and Sims* [1966] 3 All ER 601(CA) at 607-610). That action was rooted in the antiquated notion of a husband's property rights in his wife – essentially viewing wives as mere chattels who are to provide services (Ibid). The action was not only abolished in England as no longer justifiable, but shortly afterwards in most common law jurisdictions, which inherited that

action, as is pointed out by the Supreme Court of Appeal (Ibid). The action formed part of the common law applied to Namibia before independence and continued to be applied after independence by virtue of Article 140 of the Constitution (*The Constitution of the Republic of Namibia Act 1 of 1990*).

The abolition of the action for criminal conversation in England was followed in other common law jurisdictions, which inherited that action from English law. In New Zealand and Australia, it happened in 1975, in Scotland in 1976, in Ontario in 1978 and subsequently in almost all the provinces of Canada (*RH v DE*, para. 27). In the United States of America the action has been abolished or severely restricted in 42 states and the District of Columbia either by what has been called ‘anti-heart balm statutes’ or by decisions of the State Supreme Courts (Ibid.). North Carolina appears to be one of the last remaining states where tort claims for adultery are still recognised (McMillian, 2012).

The reasons for the abolition in these jurisdictions include that the action is regarded as no longer in confirmation with considerations of morality, that it has grave disadvantages and that on balance, its continued existence is no longer justifiable (*RH v DE*, para. 27). While our courts concur with this stance, it is difficult to reconcile it within the African context. Most African societies perceive adultery as immoral. Although it is maintained that the courts find less or the same answers from other jurisdictions to same legal problems, it is improbable that ideals in Eurocentric jurisdictions’ is very consistent with Afro-centric ideals. A complete disregard of Afro-centric ideals and values will hinder the development of Pan African jurisprudence. In the process, our courts will continue to import judgements and miss the opportunity to develop unique laws that reflect the values and morals of the people from an Afro-centric perspective.

Many years ago the court in *Green v Fitzgerald* 1914 AD 88 held that adultery was no longer a criminal offence in our law, because it had become obsolete due to disuse. In *Rosenbaum v Margolis* 1944 WLD 147 at 158, Blackwell J stated that:

...the criminal sanction for adultery having disappeared, the only remedy left to an injured husband is an action for divorce against his wife, with the claims ancillary thereto, and for damages against the adulterer. In so far as the latter may be regarded as a deterrent and in the public interest, I can see no good reason why it should not ensure equally in favour of the wife. There is something, in my opinion, to be said for the view that an action for damages against an adulterous third party is out of harmony with modern concepts of marriage and should be abolished. But as long as the action remains, it should remain in favour of both sexes alike.

It should be stressed that although the action was viewed as disadvantaging women, this is no longer the case as equality legislation have been enacted to protect the rights of women (See *The Constitution of the Republic of Namibia Act 1 of 1990* and *The Married Person's Equality Act 1 of 1996*). The rights of women are also included in international agreements (See the *Convention on the Elimination of All Forms of discrimination against Women*). The various other academic authors who argue that the claim should be abolished hold the view that the action is outdated and archaic and that it has lost its place in the context of modern society (See Church, 1979; Hahlo, 1980: 31; Cronje & Heaton, 2004; Erasmus *et al*, 1983; Carnelley, 2010:183-204). The Supreme Court made it clear in the *Sibongo case* that public policy and the legal convictions of the community are informed by our constitutional values and norms. 'An examination of the origin of the action and its development reveals that it is fundamentally inconsistent with our constitutional values of equality in marriage, human dignity and privacy. That examination also demonstrates that the action has also lost its social and moral substratum and is no longer sustainable (*Sibongo case*, para. 39).

Both the SCA and Constitutional Court in *RH v DE* and in *DE v RH* referred to the changing societal attitude to adultery both South Africa and elsewhere (*RH v DE* paras. 27-28, *DE v RH* 2015 (5) SA 83 (CC) paras. 23-44). Other common law jurisdictions followed suit to abolish the action, including Ireland, Barbados, Jamaica and Trinidad and Tobago (Ibid). The SCA and Constitutional Court also pointed out that an action of this nature does not exist in France, the

Netherlands, Germany or Austria. In its comparative survey, the Constitutional Court noted that the action was still operative in a number of African jurisdictions including Zimbabwe, Botswana and Namibia although it had been abolished in Seychelles (*Sibongo* case, para. 41).

African Customary Laws and the Ubuntu Philosophy

In Africa, adultery has for a long time been regarded as a social evil and a blatant aberration from the morals of humanity. The legal consequences of committing adultery have varied according to place, community values, the historical era and prevailing ideology (Carnelley, 2013). In African communities, adultery has for a long time also been viewed critically and treated as a serious issue, as it has been treated as a criminal offence in some and a civil wrong in others. The approach to adultery has been largely informed by religious and cultural notions of the inviolability of marriage. The civil action of *contumelia* is thus touted to be geared to protect marriages and family values through the award of damages against a paramour who is adjudged to have violated and desecrated marriage and the marital bed (*Bekker case*, para. 24-5).

In the *Bekker case* it was pointed out that in recent years the attitude towards the inviolability of marriage appears to have thawed somewhat as adultery as a matrimonial offence or civil wrong seems no longer to serve its purpose i.e. of preventing break-ups in marriage by adulterous elopers (Ibid). However, it is evident that the development of law surrounding adultery and its consequences has taken place over centuries and in different jurisdictions. Therefore, throughout time it has been common cause that the act of adultery was regarded as unacceptable and contradictory to societal customs, norms and morals. It was also seen to be a complete desecration of the sanctified marriages and family life. Marriages were not placed on a pedestal but they were protected by the state and the society alike.

Customary law is given recognition by the Namibian Constitution where all customary laws that are considered to be operating within the parameters set out by the Constitution may remain valid unless repealed by an Act of Parliament (Article 66(1)).

Generally, the union of a marriage under customary law is viewed as sacred and holds a significant role in the advancement of the society, because such communities place marriage on a pedestal. When two parties jointly engage in an act of adultery, customarily, they are perceived as having desecrated the holy union that is marriage. As a result, there are avenues for action to be taken among some communities, which may also lead to a punishment being imposed on the wrongdoers (Hinz & Namwoonde, 2010; Hinz & Gairiseb, 2013; Hinz & Gairiseb, 2016; Kavari, 2005). Adultery is therefore classified as a wrong and may be brought forth to a community court to be resolved as a dispute. What differs between civil proceedings and customary decisions is that the amount offered to the aggrieved party is usually considerably lower in traditional courts as compared to formal law courts (Customary law compensation is different from compensation under common law. While the claim for compensation under common law has to substantiate the loss in economic terms, compensation under customary law consists of a standardized amount of cattle (or the equivalent in money as determined by customary law) irrespective of the economic weight of the loss, thus weighing out the loss in a broader sense. In other words, customary law compensation balances the economic side of the loss, but also has, in terms of the conventional civil or criminal matter dichotomy, a punitive element). However, there is indeed a common consensus that the act of adultery is a violation of the innocent spouse's personality rights, and the payment of compensation is seen as *wiping the tears* (Hinz, 2007).

Cultural diversity within states is increasingly considered as something that ought to be legally reflected (Ibid, p. 67-8). There is more and more talk about the right to culture and even the right to one's own law (Hinz, 2006). Cultural diversity is increasingly being accepted as a societal asset that is worthwhile to recognize in legal terms (Ibid). Legal pluralism has developed from a mere empirical tool of anthropologists and sociologists into a normative concept according to which legal plurality ought to be interpreted in legal terms (Ibid).

The assumptions in the judgements of the courts are not based on concrete responses from the public itself but viewpoints that are

influenced by foreign or western jurisdictions. Surveys and debates for the public to provide its input in this regard would inform whether there are changes in our societal attitudes towards the claim based on adultery. We cannot reason that such an action has lost its lustre, as loss of consortium and *contumelia* caused by adultery is in violation of the Namibian Constitution (Article 14(3)) and is still viewed as a serious offence in customary law (Hinz & Namwoonde, 2010; Hinz & Gairiseb, 2013; Hinz & Gairiseb, 2016). Hence, the abolition of the claim has various implications on African customary laws and even the African philosophy of *Ubuntu* as it relates to issues of human relationships.

The word *Ubuntu* is derived from a Nguni (isiZulu) aphorism: *Umuntu Ngumuntu Ngabantu*, which can be translated as ‘a person is a person because of or through others’ (Tutu, 2004). *Ubuntu* can be described as the capacity in an African culture to express compassion, dignity, humanity, reciprocity and mutuality in the interest of building and maintaining communities with justice and mutual caring (Tutu, 1999). The *Ubuntu* philosophy represents an African conception of the human being, and his or her relationship with the community that embodies the ethics that define Africans and their social behaviours (Mbingi & Maree, 2005). Within the African environment, socio-cultural underpinnings are rigorously applied and the African *Ubuntu* philosophies are omnipresent throughout the continent. Therefore, both the *Ubuntu* socio-cultural and legal dimensions should be applied and considered critical in our legal systems. The reasoning in the two judgments of the superior courts are contrary to the *Ubuntu* philosophy and African customary laws.

Other Jurisdictions

The United States of America

Glass (2004) opines that the United States of America (USA) is experiencing a ‘crisis of unfaithfulness’. In this regard, she noted that some courts had defined adultery as not involving moral turpitude and thus not inherently prejudicial (Ibid). Social science surveys depict that at least 20 to 50 percent of American adults admit to committing adultery, whereas some studies place the adultery rate at

70 percent (Ibid). The U.S. Supreme Court has held that the State has an interest in protecting the institution of marriage, while, at the same time bearing the duty to uphold the freedom of association as a fundamental right protected by the U.S. Constitution.

As a result, from the 1980s, most states in the U.S. had derecognized adultery- based torts like alienation of affection and criminal conversation (Patel, 2003). There is, accordingly, an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. Issues that informed the approach included the need to emphasize personal choice, to keep the courts out of the bedroom, decriminalize sex acts, to remove the use of the law to legislate morality (See *Bekker case*, para. 33). That notwithstanding, U.S law still recognizes the adultery-based tort of 'intentional infliction of emotional distress' as any intentional, reckless or negligent conduct of a person that is outrageous or exceeds all bounds of tolerance or decency and causes another person severe emotional distress (Ibid).

Nigeria

In Nigeria, the law still takes a very strict view of adultery. The legal system there is pluralist in nature and consists of English, customary and Islamic laws, which regard adultery as a matrimonial wrong and a ground for, divorce (Ibid, para. 29-30). The Matrimonial Causes Act deals with damages in respect of adultery (Ibid). A party may, in a divorce petition based on adultery join the other party as a respondent and claim damages for the adultery (Ibid). Damages are not, however, awarded if the adultery has been condoned, whether subsequently revived or not or if a decree of divorce based on the adultery is not granted, or the adultery was committed more than three years before the date of the petition (Ibid).

In assessing the damages, some factors to be taken into account were set out in the Nigerian case of *Mohammed v Mohammed* (1952) 14 WACA 199. It includes the actual value of the adulterous spouse to the petitioner i.e. both pecuniary and consortium; injury to the claimant's feelings and the blows to his or her honour; the co-respondent's means and conduct; the conduct of the spouses

themselves, especially the adulterous spouse and whose harshness or cruelty might have undermined the non-adulterous spouse and the co-respondent's knowledge that the adulterous party is married. In *Adeyinka v Oburuogu* the Supreme Court of Nigeria stated that the said damages are to compensate for loss of consortium and outrage of honour and family caused by adultery and not to punish the adulterer ((1966) 1 All N.L.R. 210 at 212-213).

Zimbabwe

The law in Zimbabwe is akin to the law that presently obtains in this jurisdiction as discussed above (*Takadiini v Maimba* 1996 (1) Z.L.R. 737). In this regard, there has been some degree of consternation from some feminists who incline to the view that some judges appear to take a lackadaisical approach to adultery cases, considering the fact that it affects Zimbabwean women more than men. In this regard, they take the view that the law has treated the issue of adultery with less seriousness than it deserves (Chirawu, 2006).

Soon after the South African Supreme Court of Appeal gave its judgment in *RH v DE*, Justice Hlekani Mwayera of the High Court of Zimbabwe, handed down judgment in the case of *Njodzi v Matione* (HC 11253/14) [2016] ZWHHC 37 in January 2016, wherein the court refused to follow the South African example and declare the action of damages for adultery unconstitutional. The central question was whether in the Zimbabwean context these foreign decisions applicable? In other words, one has to consider whether the reasoning adopted in South Africa, Seychelles, Canada and New Zealand is possible and applicable in light of the Zimbabwean Constitution's normative framework and our social context (Ibid).

From case law, it is settled in that jurisdiction that in coming up with adultery damages the following factors have to be considered: [1] The social and economic status of the plaintiff and the defendant [2] The Character of the spouse involved [3] Whether or not the defendant has shown Contrition [4] The need for deterring measures against the adulterer [5] The level of award in similar cases (Ibid, p 5; See also *Khumalo v Mandishona* 1996 (1) ZLR 434; *Nyakudya v Washaya* 2000 (1) ZLR 65 C; *Chenesai Rateiva v Tsistsi Venge* HB 152/11). The

Court further noted that of course the circumstances of each case come under scrutiny as the court makes the decision. The reason behind adultery damages being the protection of the sanctity of the marriage institution (Ibid).

Further, in *Katsimbe v Buyanga* (1999 (1) ZLR 256 H at 258-259) Robinson J affirmed the purpose of adultery damages as the protection of the marriage institution when he remarked as follows:

Before addressing myself to the quantum of damages to be awarded to the plaintiff, I wish to say that, in my view, where a third party is shown to have intruded sexually upon a marriage and to have contributed to the breach of duty of marital fidelity which each spouse owes the other by committing adultery with one spouse, the courts, in the absence of mitigating circumstances should be seen, in their award of damages, to come down hard on the adulterer or adulteress as opposed to treating him or her with kid gloves for a variety of 'expedient reasons.

Precedents in the Zimbabwean jurisdiction reveal that adultery damages are underpinned on the preservation of the sanctity of marriage. The Matrimonial Causes Act provides sanction issues of divorce and distribution or apportionment of property. Divorce is granted in circumstances where it would have been shown that the marriage has irretrievably broken down. Adultery is still a recognised ground of divorce and as such, it is still part of Zimbabwean law (*Njodzi case*, p. 5). Thus, clearly for all intents and purposes the legislature as it currently stands condemns adultery in Zimbabwe (Ibid).

A Constitutional Analysis

The preamble of the Namibian Constitution recognizes and accepts that the Namibian moral fabric is engraved in the country's culture, religion and traditional values. The institution of marriage is entrenched deeply in the country's culture, tradition and religion and its protection has been in unambiguous language propagated by the courts (*Njodzi case*, p. 7; see also *Katsumbe v Buyanga* 1991 (2) ZLR 256

and *Mapuranga v Mungate* 1997 (1) ZLR 64). Malaba J (as he then was) in the *Mungate case* held: “Adultery is still prohibited by public opinion as an act of sexual incontinence” (Ibid). The nation has a duty to protect the marriage institution and third parties encroaching into a marriage are part of the nation (Ibid).

The import of the delict in the interest of protection of the marriage institution is also of constitutional interest or national interest given the values under which our constitution is underpinned (*Njodzi case*, p. 7). Adultery damages are to compensate the innocent party to a marriage for their loss of consortium and *contumelia*. Marriage and family are social fundamental institutions. They have more than personal significance. The Constitution would not seek to protect the marriage institution if the duty for the sustenance of the institution was wholly for the parties, at least the African context, given the importance placed by society on the marriage institution.

The argument that the delict brings about indignity on the third party and that it infringes on the rights of the third party cannot be sustained when from the perspective of its invasion of the marriage institution (Ibid, p. 8). The marriage institution is protected by the society and the nation in the Constitution (Ibid, p. 8). In circumstances where a third party is prepared to violate the marriage institution, they cannot be seen to complain of their dignity being impaired when they would have violated the very institution they vowed to protect through the constitutional values (*Njodzi case*). The invasion of a marriage by a third party should be seen as an attack on the dignity and privacy of the innocent party. The dignity of the adulterer ought not to be more important than that of an innocent party to a marriage, the dignity and right to privacy of all citizens is not absolute (Ibid). The rights in the Constitution should be enjoyed responsibly, and each one has the duty to uphold and respect the fundamental freedoms and rights enshrined in the Constitution. To argue that dealing with an adultery damages claim trial, would infringe on privacy of the defendant as issues of intimacy would be delved into, amounts to barring prosecution of all matters of a sexual nature (Ibid, p. 8).

The author concurs with the High Court of Zimbabwe’s decision that there is nothing unconstitutional when one considers the

purpose of adultery damages. The potential infringement of dignity and privacy should not be viewed in isolation of the rights of the innocent spouse in a marriage. All persons are equal before the law and have equal protection and benefit of the law (Article 10 of the Namibian Constitution). Reading that article does not reveal that wrongful conduct is sanctioned by the law.

Other jurisdictions have in part or fully done away with the delict of adultery. Whereas it is important to take note and appreciate what is going on in other jurisdictions, it is of paramount importance to apply the principle in the context of our nation as a constitutional democracy (*Njodzji case*). Public policy, as reflected in our Constitution depicts our values as a nation. The protection of the family and marriage institutions is encapsulated in the constitution. It can therefore be argued that society, which was involved in the constitution making process, still views adultery negatively.

Adultery is still a consideration in our law for divorce and as such given our constitutional provisions on the rights, freedoms, protection of the marriage and family institution one cannot just in the obstruct, from foreign jurisdictions with different societal values, declare an otherwise legitimate claim illegitimate (Ibid, p.9-10). The importance of the marriage and family social institutions cannot be underplayed, more so given that the relationship is not only significant to the individuals concerned but also for the public at large (Ibid). Therefore, marriage should be treated as a human institution, which is regulated by law and protected by the Constitution, which, in turn creates genuine legal duties. It can clearly be deduced therefore, that a marriage institution, has both the private and public complexion, hence the need for its protection (Ibid).

Adultery is viewed as sin in most Christian and African communities. While the South African and Namibian courts are influenced by western jurisdictions, the courts in Nigeria and Zimbabwe envisage an African vantage point in their judgements' and have developed criteria for awarding damages in an action for adultery. Since adultery is considered as a ground for divorce then it would be a contradiction to consider the delictual claim for adultery damages as irrelevant (*Njodzji case*, p. 5). In the case of *Zimnat Insurance Company Limited v Chawanda* (1990 (2) ZLR 143) stated that the court

in the interests of justice, can develop common law but that this does not mount to usurping the legislature's function of making law (Gubbay ACJ in *Zimnat Insurance Company Limited v Chawanda* 1990 (2) ZLR 143; see also *Duplessis and Others v De klerk and Another* [1966] ZACC 10, 1996 (3) SA 850). Albeit it can be said that the Namibian Courts have a moral duty to develop the common law, unlike the South African Constitution, there is no provision for doing so in terms of the Namibian Constitution.

Conclusion and Recommendations

Many years after colonialism African modern courts still usually miss the opportunity to develop our laws in a unique way, but rather borrow extensively from western jurisprudence. This is not to say a comparative study is wrong, what might be wrong is basing fundamental decisions on the opinions or systems of western jurisdictions. The advent of Constitutionalism has a huge impact on African customary laws. In interpreting the Constitution, the courts tend to eradicate customs that it sees unjust, even though it is seen as just in the community it is practiced.

The courts' decisions on abolishing the action is inconsistent with African customary laws and ideals, and deteriorates the development of African family law or jurisprudence in the in the 21st century. It is therefore recommended that our courts must craft a balanced (win-win) approach, which is consistent with the Constitution, which respects family rights of both parties and the rights of the third party. The action has been abolished in mostly the Western nations, and in only one or two countries in Africa. This implies that most African societies might be mostly in favour of the action as embodied in their customary laws and norms. Further, African courts should not abolish the action entirely but come up with sustainable criterions like in Nigeria and Zimbabwe.

In addition, African courts of law faced with a certain fundamental issue of society, can borrow from our Ubuntu philosophy, instead of coping only the western style of judicial activism and precedent, which has a potential to diminish African jurisprudence. In assessing the views, values, morals or the legal

convictions of society, the courts must adopt a highly purposive approach which is collaborative and supported and reflected by public viewpoints through i.e. media, the legislature and research findings through the Law Reform and Development Commission. This would be a good approach on assessing the alleged changing conditions of today. Albeit, the action is considered repugnant to social conditions of today, its abolition will undoubtedly open floodgates for adultery and lead to the wicked problem of gender based violence especially in African setups. In turn, adultery will become one of the biggest factor to the breakdown of families, which will have disastrous consequences for children who are vulnerable. Hence there is need for courts to not entirely abolish the action but rather craft a unique approach which shall remain in favour of both sexes alike, and that takes into consideration African *boni mores* and philosophy as a compass when interpreting the Constitution and assessing the legal and moral convictions of an African society.

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Africa, Free Trade Jurisprudence and the Trade-Labour Linkage Proposals: A Critique of the Tripartite African Free Trade Area Agreement

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Introduction

Global trade practices are governed by international trade settlements on multilateral, regional and bilateral levels (Elsig, 2013; Heydon, 2002). Such legitimately obligatory and enforceable settlements have ramifications for a range of “non-trade” matters like human rights and occupational issues (Warikandwa & Osode, 2014). These ramifications on work related matters have stimulated vigorous discussions concerning the addition of a trade-labour linkage clause in the multilateral trade regulatory system of the World Trade Organisation (WTO) (Ibid). Such debates are important for a continent like Africa, which is easily one of the poorest continents in the world with a prevalence of high levels of poverty, which continuously diminish the quality of lives of its poor inhabitants (Warikandwa & Osode, 2017). This book chapter will argue for the adoption of a sustainable legal strategy aimed at improving the protection of core labour standards in African Free Trade Agreements, particularly in the Tripartite African Free Trade Area’s legal framework. This approach, which has been adopted in other regional free trade agreements in other parts of the world, as this chapter will show, could assist in addressing challenges related to impoverishment cycles in Africa and effectively render it almost possible for workers on the continent and other developing regions of the world to escape the impoverishment trap.

Global trade jurisprudence informing trade practices on the continent has thus far failed to be sensitive to the developmental interests of Africa (Warikandwa & Osode, 2014). For example, classical political economy and the Neo-classical theory advocates for

the free trade ideology. This is necessitated by David Ricardo's comparative advantage theory which hypothesizes that free trade is advantageous as it allows countries to specialise in producing goods that require comparatively less factor inputs (Deardorff, 2011; Chingarande *et al*, 2013). The theory's underlying reasoning is premised on the ideology of opportunity cost and advances the view that even countries that are worse at producing any good will gain something from trade (Goldin, 1990, Harkness, 1978). The approach implicit in the comparative advantage theory explains why African countries strangely focus on cheap labour and lowered compliance on the protection of labour standards as their comparative advantage (Warikandwa & Osode, 2017). The reason for specialising in different trading goods is explained by the Heckscher-Olin theory which provides that countries tend to export goods that require more inputs from a production factor they have in abundance (e.g. capital, land and labour) (Anand, n.d.). The political implications of these theories are to repeal restrictions on trade such as quotas, tariffs or national subsidies since they are considered as negatively affecting global trade and the general welfare of the world's citizens. As such, different rounds of the General Agreement on Tariffs and Trade as well as the World Trade Organisation are promoting free trade by reducing tariffs as well as non-tariff barriers. This approach has led to the exploitation and impoverishment of Africa through exploitative free trade practices such as the use of cheap labour, violation of human rights in trade and the exploitation of Africa's natural resources with little gains being realised (Warikandwa & Osode, 2017). The negative impact of free trade policies on Africa have been exacerbated by the fact that African governments and/or policy makers have thus far significantly failed to come up with a developmental friendly trade agenda as well as jurisprudence for the continent.

In efforts aimed at addressing challenges posed by the free trade jurisprudence on the continent, the African Union (AU) has embarked upon an integration agenda for the African continent with trade being positioned as an important element to creating productive employment and reducing poverty (COMESA, 2015; Mwanza, 2013; Vanzetti, 2012; UNCTAD, 2011; MacMillan & Rodrick, 2011; Hoekman & Winters, 2007; and Kolben, 2007).

Recent studies have produced results that show the essentially positive effect of regional integration in Africa and the importance of labour market policies to compliment trade policies in order to address employment concerns (Mashayekhi *et al*, 2012; McMillan & Verduzco, 2011). African ministers of trade recommended in November 2010, in Kigali (Rwanda), that Africa should fast track its regional integration process (United Nations Economic and Social Council, 2013; Mwanza, 2013). This expression of political will was reaffirmed during the 18th African Union Summit held in Addis Ababa in January 2012, as African heads of state and government endorsed an action plan for boosting intra-African trade and the establishment of the Continental Free Trade Area (CFTA), with 2017 having been set as the tentative year for the creation of the CFTA (See the revised draft of the Synthesis Paper on boosting Intra-African Trade and Fast Tracking the Continental Free Trade Area, published in January 2012; COMESA, 2015; Mwanza, 2015; Mwanza, 2013). The CFTA was not created in 2017 but has since come into effect in 2018. The studies indicate that, for Africa as a whole, the establishment of regional Free Trade Agreements (FTAs) would increase continental exports, real income, and real wages for all categories of workers (Karingi & Mevel, 2013; McMillan & Verduzco, 2011; McMillan & Rodrick, 2011; Polaski, 2004).

With regional integration expected to increase wages and/or employment (Organisation for Economic Co-operation and Development, 2006; Kwelke & Mboya, 2005; World Bank, 2011), it is unclear why African countries are finding it difficult to use trade to benefit workers. After all, pre-colonial African societies always pursued trade activities with a spirit of Unhu/Ubuntu, to the effect that societies collectively benefited from the proceeds of trade (Nhemachena & Warikandwa, 2017). This is hardly the case in the contemporary neoliberal society underlined by free trade jurisprudence. Further, the prospects of trade gains improving living standards for the continent's citizens prompt the question why African countries continue to resist the incorporation of trade-labour linkage clauses, commonly known as social clauses (Warikandwa & Osode *Law Development and Democracy*, 2014), in trade agreements when doing so is a viable developmental option. Governments in

Africa have not been forthcoming with policy positions as to why they continue to resist binding commitments to pursue a balance between trade gains and the protection of core labour standards in trade (Melchoir, 2003; Lobel, 2004). In the context of international trade, a social clause/trade-labour linkage clause refers to the incorporation of the International Labour Organisation's core labour standards into international trade agreements. The baseline core labour standards include: freedom of association and the right to collective bargaining; the elimination of forced and compulsory labour; the abolition of child labour; and the elimination of discrimination in the workplace (Howse, 2009; Kolben, 2007; Lee, 1997; Trebilcock & Kirton, 2004).

A clear illustration of this reluctance is the exclusion of a trade-labour linkage clause from the legal framework of the Tripartite African Free Trade Area (TAFTA) legal framework. Africa aims to establish a continent-wide free trade area by 2017. Regional trade arrangements such as the TAFTA established by the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC) are regarded as some of the building blocks of the envisaged African Economic Community. The TAFTA stretches from Cape to Cairo, creating an integrated market with a combined population of almost 600 million people and a total Gross Domestic Product (GDP) of about United States (US) \$1 trillion. The unique TAFTA aims at removing trade barriers (BuaNews, 2011; Fundira, 2015) and improve levels of development and the welfare of people in the regions, which are signatories to the agreement. This observation is significant if consideration is given to the emergence of a CFTA, which also aims at improving the levels of development and the welfare of people in Africa.

This chapter interrogates the omission of a trade-labour linkage clause from the TAFTA. It examines African countries' reasons for resisting a trade-labour linkage and cautiously argues for the protection of core labour standards in future African FTAs. It is hoped that the arguments advanced in the chapter will facilitate the incorporation of a trade-labour linkage clause in the larger CFTA, which has recently been adopted. The chapter is divided into five

parts. The first part introduces the objectives and thesis of the chapter. While the second part looks at the contemporary views on the trade-labour linkage controversy, the third explores African countries' resistance to the linkage. These are followed by the fourth part, which presents examples of the use of trade-labour linkage clauses in regional trade agreements currently existing in other parts of the world. The last part proffers a number of conclusory remarks.

Contemporary Views Regarding Proposals for a Trade-labour Linkage

African countries have viewed proposals for a trade-labour linkage to be part of a protectionist agenda by developed countries aimed at undermining their competitive advantage resulting from lower levels of compliance with core labour standards (UNCTAD, 2000; Sengenberger, 2005; Alston, 2002; Gonzalez, 2009; Elliot, 2004; Collier & Bamu, 2012; Lim, 2001; Maskus, 1997; Hoekman & Kostecki, 2009). Trebilcock (2011) has argued that imposing sanctions on importing goods produced in circumstances in which there is a perceived non-compliance with core labour standards risked a protectionist abuse by importing countries. Earlier, Trebilcock and Howse (2005) had opined that privileging core labour standards over other human rights by protecting them through hard law such as the multilateral trade legal framework was "...to risk a protectionist rationale for trade or other economic sanctions."

Hoekman and Kostecki (2009) have argued that, "...using trade remedies to enforce labour standards would worsen the problems at which they are aimed (by forcing workers in targeted countries into informal or illegal activities)." Further, they opined that, "...unemployment will rise and, given the absence or weakness of social safety nets (unemployment insurance), can be expected to have a detrimental impact on poverty." Hoekman and Kostecki then conclude that based on the arguments they advanced, it is not surprising that developing countries oppose a trade-labour linkage.

In the context of this chapter, it is extremely important to ascertain whether African countries like any other developing countries would suffer by protecting core labour standards in trade

as suggested by Trebilcock, Howse, Hoekman and Kostecki. Lester, Mercurio and Davies (2012) have on their part argued that it would be productive to pursue the debate over the appropriate relationship between trade and human rights. Petersmann (2002) has argued that: “In order to remain democratically acceptable, global integration law must pursue not only ‘economic efficiency’ but also ‘democratic legitimacy’ and ‘social justice’ as defined by human rights.” Frank Garcia (2005) has shown that the present development debate is not about global economic expansion as such but rather about the erasure of economic inequities, the capacity of international trade policy to lift the world’s deprived masses from poverty and the promotion of the economies of developing countries where the vast majority of the impoverished reside. Garcia’s view is especially important for the African context in which trade is aligned neither to development nor to the welfare of workers on the continent who are largely responsible for the trade gains. Garcia’s view leads to the discussion on African countries’ resistance of a trade-labour linkage clause from trade agreements.

Why African Countries Resist a Trade-labour Linkage

This section discusses claims regarding the appropriateness of a trade-labour linkage in the African context with a view to establishing whether there is a plausible basis for the exclusion of such a linkage from the TAFTA in a world characterised by general acceptance of the need to balance the interests of business and effective protection of human rights in trade.

Arguments against a Trade-labour Linkage in the African Context

It may be contended that a regulatory framework consisting of liberal trade rules supplemented by enforceable competition and social welfare rules promoting fair opportunities and the equitable distribution of trade in the African context and the world at large may be achieved through the incorporation of trade-labour linkage clauses in multilateral trade agreements (Trebilcock, 2011; Warikandwa, 2013; Hafner-Burton, 2009). However, African countries have

steadfastly resisted proposals to institute a trade-labour linkage in the multilateral trade regime as they regard the linkage proposals as part of a hidden protectionist agenda of developed countries to usurp developing countries' competitive advantage derived from cheap labour (Howse, 1999; Collier & Bamu, 2012; Warikandwa & Osode *Speculum Juris*, 2014). This reasoning has its origin in the views of the late former president of Tanzania, Julius Nyerere, who argued that there is no room for the universal application of labour standards in trade because the countries of the world are at significantly different levels of development (Nyerere, 1999; Alston, 2002; Hafner-Burton, 2009). Nyerere opined:

... for if there is no effective restraint upon the rich and strong, then their interests will prevail, regardless of the needs (let alone the interests) of the poor ... In this fact lies the almost unanimous Southern hostility to the proposal that 'Trade Related Social Standards' be brought into the orbit of the WTO rather (or as well as) the ILO. For, compared with the WTO, the ILO is democratic in structure, and it does not seek to usurp the national sovereignty of any state [Sic].

Nyerere's opinion implied that proposals for incorporating core labour standards into multilateral trade rules would amount to an ill-conceived move the effect of which would be to stretch developing countries beyond their enforcement capacity in addition to constituting a direct affront to their efforts to industrialise. If correct, this inference could serve as a plausible reason for African countries' resistance to the trade-labour linkage idea.

Nyerere's sentiments are buoyed by the arguments of South Africa's former Minister in the Presidency, Trevor Manuel (Donnelly, 2014) who argued that the increased mechanization in the world makes it important for labour unions to lower their demands for wage increases and place greater significance on job creation. Similar sentiments were echoed by South Africa's former Minister of Finance, Pravin Gordhan who advocated for labour market flexibility in order to enhance job creation (BusinessDay, 2011). The general impression created by these two highly respected South African leaders is that it is not the quality of the job or the level of

remuneration that matters but the availability of jobs for Africans whose continent is unfortunately characterised by high unemployment levels (Flanagan & Khor, 2012). Their views have been echoed by Scarpetta, Sonnet and Manfredi who argued that, “One way to encourage ... employment ... very common in the Organisation for Economic Co-operation and Development high income economies, is to apply a lower minimum wage” (See also the Integrated Youth Development Strategy for South Africa, 2011; South African National Treasury Discussion Paper, 2012; Donnelly, 2012). Whether such policy shifts would be ideal for the majority of Africa’s impoverished inhabitants is subject to debate. In his 2010 State of the Nation Address, the South African President Jacob Zuma announced for the first time that the proposed youth wage subsidy, which was intended to help first-time job seekers gain entry into the labour market, would be adopted. However, the Congress of South African Trade Unions (COSATU) has been firm in its objection to the subsidy, which it claims would open the door to cheap labour (BusinessDay, 2013).

It is therefore plausible to argue that the adoption of a binding trade-labour linkage clause could produce undesirable outcomes for its intended beneficiaries, which include the mostly poor African workers and their dependants (Flanagan & Khor, 2012; Ford, 2008; Government of Ireland, 2006; Greenhouse & Barbaro, 2006). African countries therefore contend that they too should be afforded the opportunity to rely on cheap labour to industrialise, as did the developed countries who are presently championing the trade-labour linkage proposals (Griffin *et al*, 2008; Warikandwa, 2012). Implicit in this reasoning is the argument that it is grossly unfair for developed countries to be seeking to enforce the protection of core labour standards in trade when they benefited from offensive practices in the past.

The Case for a Trade-labour Linkage in the African Context

Whereas there may be legitimate concerns against instituting a trade-labour linkage from an African perspective, compelling arguments for such a linkage also exist. Central to the credibility of

such arguments are misconceptions by African governments of what a trade-labour linkage regulatory framework implies. This section highlights some of those misconceptions pertinent in the African context.

There is no Consensus on What Core Labour Standards Are

African countries, like Trebilcock (2011), have taken the view that a consensus on core labour standards is not practical and does not exist. Lee (1997) has labelled this view as “puzzling since it is evident that such a consensus not only exists but has existed for decades.” The core labour standards were identified in the ILO Declaration and the Universal Declaration of Human Rights. They are expressed as follows: a) eliminating all forms of forced or compulsory labour (the ILO Elimination of Forced and Compulsory Labour Conventions 29 and 105); b) effectively abolishing child labour (ILO Abolition of Child Labour Conventions 138 and 182); c) eliminating discrimination in respect of employment and occupation (ILO Elimination of Discrimination in respect of Employment and Occupation Conventions 100 and 111); and d) ensuring freedom of association and the right to collective bargaining (ILO Freedom of Association and Collective Bargaining Conventions 87 and 98). Tsogas (1999) has noted that the fact that the ILO’s membership is nearly universal amongst developed and developing countries implies acceptance of the principles enshrined in the ILO Constitution such as freedom of association, the right to collective bargaining, and the rejection of inhumane treatment of labour (See also the preamble of the ILO Constitution which entered into force on 4 June 1934).

Rejecting the existence of consensus on what core labour standards are has been used by African countries as a basis for the continued use of child labour (Miller & Tsoka; Nichols, 1993; Tsogas, 1999). These countries have often pleaded the defence of “culture” as an excuse for the use of child labour in trade (Tsogas, 1999; Baland & Robinson, 2000). According to Tsogas: “The fatalistic argument goes like this; it is just the way things are done here, so nothing much can be done.” Closely related is the argument that in Africa, families have very low incomes and therefore children must do their part as

an essential cultural element, which fosters character development in children (Freedom House, 2010; Mazonde, 2001; Harpur, 2010; Harper *et al*, 2010). However, in the twenty-first century it cannot be cultural to consider factory work as a fundamental part of a child's development in one's culture. The truth of the matter is that business prefers child labour because it is cheap (Harper *et al*, 2010; Nichols, 1993; Miller & Tsoka, 2012; Plan Malawi, 2009). Accordingly, the notion that trade-labour linkage clauses will threaten national culture in African States is a myth created by vested interests; in fact, it is the pervasive commercialism of the free market, which is the real threat to authentic African cultures (Hestermeyer, 2014). Heyns and Stefiszyn (2006) have argued that all too often:

...leaders sing the praises of traditional communities while they wield arbitrary power antithetical to traditional values, pursue development policies that systematically undermine traditional communities, and replace traditional leaders with corrupt cronies and party hacks. Such cynical manipulation of tradition occurs everywhere.

Developing country governments and international development agencies have long been aware that human capital development, more than physical accumulation, is the basis for economic and civil progress (Cigno, 2011). However many children in African countries fail to complete even primary education, whilst some do not go to school at all with child labour being stubbornly high because, according to Baland and Robinson (2000), "parents are either credit or bequest constrained." It is submitted though that insuring families against the risk of a downturn in parental income could lead to the reduction of child labour (Epstein & Kahana, 2008). This can be done through human capital development. However, African governments seem not to be genuinely committed to human capital development, which can address any downturn in parental income but are fixated on quick short-term economic gains, which are not sustainable in the long-terms (Economic Commission for Africa, 2012). In June 2012, Rob Vos, the United Nations Director of Economics indicated that African countries must focus on long term economic gains rather than short term political gains. Vos was adding

emphasis on recommendations made in the 2012 Economic Report on Africa, which stressed the need for African countries to focus on investing in human capital and regional integration.

Low Wages Lead to Economic Success

Governments in African countries insist that low wages form part of their competitive advantage in trade (Ikeme, 1999). However, Tsogas (1999) has argued that if low wages automatically translated into economic success, then the world's poorest countries would be economic superpowers. However, they are not, because differences in wages are actually a reflection of differences in productivity (Klein, 2012). Low wages tend to go hand in hand with low productivity (UNCTAD, 2012). Countries should not therefore lower wages but instead raise productivity (UNCTAD, 2012). A practical example of how increase in productivity leads to economic success is offered by Brazil. Brazil's minimum wage policy, which is regarded as a benchmark for social security benefits in the world, is premised on the basis that workers can have a high minimum wage set for them in order to increase productivity and ensure economic growth (Lemos, 2004). Brazil's minimum wage policy aims at increasing the minimum wage of all workers in different economic sectors without changing the shape of wage distribution and destroying jobs (Lemos, 2004). In 2006, the minimum wage in Brazil was set at a figure, which was more than five percentage points above inflation (Hirsch, 2006; ILO, 2010; 2012). Brazil today is one of the fastest developing countries with a strong economy, which provides evidence that labour standards play an important role in enhancing productivity and the resultant economic growth (Newfarmer & Sztajerowska, 2012; World Bank, 2012; government of Ireland, 2006).

In addition, the most successful exporters in developing countries do not suppress core labour standards to reduce production costs (Salem and Rozental, 2012). The economic performance of the East Asian newly industrializing countries (NICs) was not due either to the brutal exploitation of labour or to downward real wages (Newfarmer & Sztajerowska, 2012; Pier, 2006; Yue, 2001). What have been of greater importance are the productivity gains from education, infrastructure development and

the restructuring of markets from low-wage labour-intensive to higher value-added and skills-intensive techniques (Yue, 2001; Moneyweb, 2010; Tsogas, 1999). It is therefore difficult to understand the economic rationality of African governments' consistent resistance to trade-labour linkage proposals.

Incorporating a Trade-labour Linkage Clause in Trade Agreements Threatens National Sovereignty

The principles established by core labour standards are translated into national law and in that respect state practice may differ, depending on the institutions and customs of the country concerned (Bagwell, 2001). Lim (2001) has argued that:

...by virtue of being members of the UN, States have already committed themselves to uphold basic human rights. These are in most respects synonymous with core labour standards. The social clause would not create any new human rights obligations but would strengthen the existing international enforcement mechanism.

However, the argument based on sovereignty is clouded by the new global realities (Jackson, 2001; 2003; Hoy, 2005). The position that sovereignty should not be ceded on issues such as domestic labour policy regulation needs to be re-assessed (Hoy, 2005). The reality is that sovereignty has already been ceded and policy is being shaped to an increasing extent by the demands of the global market (ILO, 2010; 2012). The problem is no longer avoiding a potential loss of sovereignty, but whether to take an opportunity to reclaim some measure of it (Wheeler, 2007; Lester *et al*, 2012).

It is thus plausible to argue that the issue of sovereignty raised by African governments may not be entirely compelling. Against this background, it is necessary to re-evaluate African governments' political will and commitment towards improving the general welfare levels of their working citizens. Similarly, that background provides justification for this chapter's interrogation of the exclusion of a trade-labour linkage clause from the framework of the TAFTA.

The Tripartite FTA for Africa (TAFTA)

Regional trade agreements now often incorporate trade-labour linkage clauses to try to fill the gap created by the continued deadlock in efforts to incorporate a trade-labour linkage clause into the multilateral trading system (Grandi, 2009). Whilst debates have been dragging on regarding the effectiveness of trade-labour linkage clauses in protecting core labour standards in trade (Griffin *et al*, 2008; Maskus, 1997; WTO, 2006), they can still be viewed as a positive step in trying to address the violation of those labour standards in the trade context. However, the recently adopted TAFTA appears not to have followed this route. Its framework is clearly devoid of any allusion to a trade-labour linkage clause. The exclusion of a clear trade-labour linkage clause in the TAFTA might be a sign that developing countries are not willing to change their stance on incorporating core labour standards into multilateral trade agreements (See Article 3(1) of the TAFTA which gives one of its objectives as the need to, “...promote the rapid social economic development of the people of the region through job and wealth creation and the elimination of poverty, hunger, and disease; through building skills, innovativeness and hard and soft infrastructure; and through improving the location factors for sustainable generation of local, regional and foreign investment and of trade opportunities.” This is the only clause that makes mention of anything related to employment, in this case, “job creation”). Nowhere else is there mention of any matter related to the concept of a social clause.

Sadly, the omission of a trade-labour linkage clause in the TAFTA accommodates labour standards violations on the continent. Such developments on the African continent clearly signify the importance of the TAFTA, hence the exclusion of core labour standards from its current framework is questionable, especially given that the Agreement has as one of its objectives, the adoption and implementation of policies in all sectors of economic and social life that promote and consolidate an equitable society and social justice (Article 4(7) of the TAFTA). Labour standards could easily have fallen within this objective as cooperation in other areas in terms of the agreement excludes core labour standards but surprisingly

includes the environment, which is one of the issues that has been argued of late to be linked with trade (Article 42(1) of the TAFTA).

The Declaration launching the negotiations for the establishment of the TAFTA signed on the 12th of June 2011 (Herein after referred to as the Declaration) (SADC, 2011) excludes any clear reference to a trade-labour linkage clause. However, it could, by inference, be assumed that a trade-labour linkage clause could be negotiated in terms of Article 5(b), which makes reference to “trade-related areas”. From this perspective, trade-related areas could be viewed as including labour standards. However when reference is made to the Guidelines for Negotiating the Tripartite Free Trade Area among the Member/Partner States of The Common Market for Eastern and Southern Africa (COMESA), The East African Community (EAC) and The Southern African Development Community (SADC) (See the Tripartite Free Trade Area Negotiating Principles, Processes and Institutional Framework of 12 June 2011 (Herein after referred to as the Guidelines)), there appears to be a list of trade-related areas. The Guidelines provide that: “The second phase will cover negotiations on the following areas: trade in services, intellectual property rights, competition policy, and trade development and competitiveness” (See Article 2(iii) of the Tripartite Free Trade Area Negotiating Principles, Processes and Institutional Framework). Assuming this provision contains a closed list of trade-related areas, it may be correct to contend that a trade-labour linkage clause has been excluded from the TAFTA as it currently stands. However, when one considers the area of “trade development and competitiveness”, a trade-labour linkage clause could be inferred as falling within the scope of the TAFTA.

The rationale behind the omission to make a direct provision for or reference to a trade-labour linkage clause in the TAFTA by the prospective member states must be a point of interest. A perusal of the Memorandum of Understanding between The Department for International Development of the United Kingdom and The Tripartite Task Force of The COMESA, The EAC and The SADC (See The Memorandum of Understanding (Herein after referred to as the MoU) between The Department for International Development of the United Kingdom and The Tripartite Task Force

of The Common Market for Eastern and Southern Africa, The East African Community and The Southern African Development Community signed on the 27th of January 2010), reveals that there is no reference to labour matters at all. The basis of the partnership is given as working towards eradicating poverty, promoting economic growth and regional integration in East and Southern Africa (Article 2 of the MoU). Maybe the TAFTA will eventually have a side agreement on labour as an appendage. However, a nagging question is why African states did not prioritize the interface between trade and labour in a continent where the majority of inhabitants survive on less than a dollar per day?

If developing countries labelled the trade-labour linkage as a North-South debate, could the omission of “direct reference” to a trade-labour linkage clause be a manifestation of the views of developing countries to exclude labour matters from all their trade agreements, even amongst equal partners? If it is, then some developing countries have not been sincere in their arguments against a trade-labour linkage. This gives credence to the argument that debates concerning a trade-labour linkage also include the violation of core labour standards in trade between developing countries, which in turn raises doubts about the credibility of the argument that a trade-labour linkage clause will be used as a protectionist mechanism by developed countries against products originating from developing countries.

FTAs and Other Trade Instruments that Recognise a Trade-labour Linkage

A number of free trade agreements have a trade-labour linkage clause incorporated in them. This has largely been attributed to the realisation by some WTO Member States that establishing a trade-labour linkage in the multilateral trade framework is a highly contentious issue, which may not be easily resolved. Regional FTAs have thus offered an opportunity to WTO Member States who recognise the need to protect core labour standards in trade to do so. This development however has been criticised on the basis that it may in the end weaken the legitimacy on the multilateral trade regime

(Mikic, 2009). Nevertheless, it is important to assess the impact of such FTAs in efforts to curb the abuse of core labour standards in trade. These FTAs are discussed in this section starting with the United States (US)-Cambodia Free Trade Agreement.

US-Cambodia Free Trade Agreement (FTA)

The first free trade agreement to incorporate labour rights concerns into its framework was the US-Cambodia Bilateral Textile Trade Agreement (See Article 10(D) of the US-Cambodia Agreement of 20 January 1999), which provided a quota incentive to Cambodia if its garment industry working conditions were found to “substantially comply” with the Cambodian Labour Code and, by extension, international labour law (Article 10 of the US-Cambodia Agreement). Notably, the focus changed from state-level enforcement to an assessment of firm-level and industry-level compliance (Article 10 of the US-Cambodia Agreement). There had to be prior certification by the ILO of compliance with basic labour standards (Grandi, 2009; Kolben, 2004). Initially there was some debate as to whether the ILO could accede to such requests but the doubts were finally dispelled when the ILO agreed to participate in the project, an indicator that the ILO could be willing to generally assist in the implementation of a trade-labour linkage clause in trade agreements (Polaski, 2004). The US-Cambodia agreement signified a short-lived break in the State Action-State Sanctions approach of the North American Agreement on Labour Cooperation (NAALC) (Grandi, 2009). However, the State Action-State Sanctions model of the NAALC was to be adopted in a free trade agreement that the US signed with Jordan a few months after the US-Cambodia agreement (See the Agreement on the Establishment of a Free Trade Area US-Jordan of October 24 2000).

US-Jordan FTA

In the US-Jordan agreement, labour matters were addressed through an additional clause, appearing for the first time as a commitment to respect the 1998 ILO Declaration (Kernaghan, 2006; The ILO Declaration on Fundamental Principles and Rights at Work was adopted in 1998 and is an expression of commitment by

governments, employers' and workers' organizations to uphold basic human values. Such basic human values are essential to the social and economic wellbeing of every person in the world) and equally as a commitment that national legislation would include such principles and protect them by domestic legislative means (Agreement on the Establishment of a Free Trade Area US-Jordan Article 6). The labour rights language, though not strong, was directly incorporated into the body of the agreement (Agreement on the Establishment of a Free Trade Area US-Jordan Article 6(1) and Article 6(2)) requiring the parties to strive to ensure that ILO core principles and internationally recognized labour rights were incorporated into domestic law (Agreement on the Establishment of a Free Trade Area US-Jordan Article 6(1)). Moreover, in language that was to become a model for future agreements, the US-Jordan FTA stated that, "a Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties" (Agreement on the Establishment of a Free Trade Area US-Jordan Article 6(4) (a)). The parties would, however, retain "the right to exercise discretion" in their regulatory and enforcement decisions (Agreement on the Establishment of a Free Trade Area US-Jordan Article 6(4) (b)).

Ultimately, the US-Jordan FTA provided that all its labour and environmental provisions be subject to the same dispute settlement procedures as commercial disputes (Agreement on the Establishment of a Free Trade Area US-Jordan Article 17), but this equal dispute settlement provision would be diluted in future trade agreements entered into by the US (Bolle, 2003). Bolle pointed out that all of the agreements negotiated after the US-Jordan FTA contain a different dispute settlement system than the one applicable to commercial disputes and cap penalties for violation of the labour standards provisions at \$15 million or less. However, a non-derogation clause was introduced. This served as an obligation not to relax labour legislation for obtaining an advantage in international trade or investment flows. However, the most important point of principle achieved by the US in the US-Jordan agreement was to submit labour matters to the same dispute settlement procedures as those negotiated for trade questions (Article 17 of the US-Jordan

Agreement; Abrams, 2005). The relationship between labour standards and trade liberalisation thereafter gained considerable importance as a result of the US Bipartisan Trade Promotion Act (BTPAA) (See the US Bipartisan Trade Promotion Authority Act (BTPAA) of 2002). The BTPAA required that the labour impact of future agreements in the territory of the US must be researched and the results made available to the public (Grandi, 2009). It was on that basis that negotiations on labour matters took place in the context of the US-Chile FTA.

US-Chile FTA

The US-Chile FTA adopts an alternative model of including labour matters in trade agreements (The US-Chile FTA was concluded on the 6th of June 2003. Labour matters are included under a chapter of the FTA and are subject to dispute settlement procedures similar and equivalent to those provided for with regard to trade questions. See also the Chile-European Association Agreement Part III Article 16 1(b)). Under the Agreement, the most important obligation requires a Party's compliance with its own domestic labour legislation (See Article 18.2 (1) (a) of the US-Chile FTA. The Article provides that: "A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement"). This is the only commitment in the FTA for which an inability to fulfil would lead to the convening of an arbitration panel. The principle of sovereignty is explicitly safeguarded with respect to the modification of domestic legislation and determination of supervisory regimes for labour matters by the administration (See the US-Chile FTA Article 3.16). Respect for the autonomy of both Parties' judicial branches is also recognised in that the provisions of the US-Chile FTA do not allow decisions by the courts to be revised or re-opened in light of provisions of the treaty (Grandi, 2009). The US and Chile in the FTA reaffirmed their commitments to the ILO (Particular emphasis is placed on the Parties committing themselves to fulfilling their commitments to the 1998 ILO Declaration). The protection of labour standards in national legislation is not supposed to be

weakened or reduced in the interest of trade according to the US-Chile FTA.

The North American Agreement on Labour Cooperation (NAALC)

The NAALC provides signatory countries with a comprehensive system of filing grievances with country contact points to claim that a signatory country has failed in enforcing its domestic labour law (Article 3(1) of the NAALC). Although each country consents to ensuring that its labour laws and regulations afford high labour standards (Article 2 of NAALC), and strives to develop those standards (Article 2 of NAALC), the dispute resolution process will possibly be regarded as only addressing a very limited issue of whether or not a country is enforcing its domestic labour law in the areas of occupational safety and health, child labour, and minimum wage laws (Article 29 of the NAALC). The NAALC provides for collaboration amongst the Parties to the agreement to ensure that the economic possibilities presented by NAFTA translate into human resources development, better working conditions and higher standards of living in their particular countries (See the NAALC Preamble).

The safeguard of workers' fundamental rights is presented as an element of the high productivity economy that the countries, which are party to the NAALC, are seeking (See the NAALC Preamble. See also Part One of the NAALC). This clarifies the relevance of two fundamental obligations assumed by the signatories: to make constant efforts to advance labour law and find ways to "provide for high labour standards, consistent with high quality and productivity workplaces" (Article 2 of the NAALC), on the one hand, and to "promote compliance with and effectively enforce its labour law" (Article 3 of the NAALC), on the other, whilst giving due observance to their legislative and jurisdictional independence (See the NAALC preamble which affirms the agreement's respect of the constitutions and laws of the signatory parties).

Verge has made a detailed and valuable analysis of some of the cases handled by the National Administration Offices under the NAALC (Verge, 2001). However, questions have been raised as to

whether or not the NAALC has been effective in protecting workers' rights in trade. Results of studies evaluating the NAALC have been mixed (Brower, 2008). Those who claim relative success of the NAALC acknowledge some weaknesses but stress its potential within the context of trade agreements and conclude that it represents an important shift from agreements such as the GATT, which characterize any regulations addressing labour, health and the environment as trade barriers (Trebilcock & Howse, 2005). Those who claim mixed results measure the NAALC's effectiveness against the constraints inherent in a compromised agreement. They emphasise that the value of increased attention to labour rights violations and heightened cross-border solidarity whilst acknowledging the need for improvements (Trebilcock & Howse, 2005).

However, the challenges noted in implementing a trade-labour linkage in some of the regional trade agreements including the NAALC do not preclude proposals for a trade-labour linkage. African states could do well in adopting a system that works well for them. Ideally, the NAALC could be a plausible system to follow in that, though it is not perfect, it recognises the differences in the levels of development of the signatories and has seen a fair measure of economic growth in Mexico since its adoption. Of note, the NAALC has managed to protect not only workers in Mexico as a developing country but also its workers when they are working in the US (Brower, 2008; Weiss, 1998).

Conclusion

Given that the TAFTA is still at the stage of inception, it may be premature to make definite conclusions as to whether or not there is space for a trade-labour linkage clause in its framework. This is especially so seeing that since NAFTA only established the NAALC several years after its commencement. It would be wise for African countries to draw lessons from other trade agreements, which have successfully incorporated a trade-labour linkage clause. The debatable successes of other regional trade agreements such as the NAALC, USA-Cambodia Textile Agreement (Polaski, 2004; Wells,

2006; Compa, 2003), and the USA-Chile Trade Agreement amongst others raise serious questions as to whether or not adequate effort is being made by policy makers in Africa to dedicate sufficient time and resources to research work which could guide them in making policy decisions informed by their societal contexts and demands (Grandi, 2009; Flanagan & Khor, 2012; Mwanza, 2015; COMESA, 2015). Completely disregarding a trade-labour linkage might not be plausible in the current era of globalisation (Salem & Rozental, 2012; Sengenberger, 2005; Wheeler, 2007; Waterstone, 2007; Trubek, 2006; Wells, 2006; Mwanza, 2015). This argument becomes more compelling if one considers that the 2012 Economic Report for Africa strongly recommended a change in the current approach taken by African countries towards human capital development. The above discussion of FTAs that have incorporated trade-labour linkage clauses in trade agreements should assist in reviewing the policy position adopted by African governments thus far regarding the plausibility of a trade-labour linkage.

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The Unhu/Ubuntu Philosophy and Constitutional Jurisprudence in Zimbabwe: A Critical Appraisal of the Legitimacy of “Operation Restore Legacy”

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The “historical conditions” must of course not be imagined (nor will they be construed) as mysterious powers (in the background); on the contrary, they are created and maintained by men (and will in due course be altered by them): it is the actions taking place before us that allow us to see what they are. Bertolt Brecht, from “A short Organum for the Theater.”

Introduction

Zimbabwe’s new constitutional dispensation marked by the transition from the Lancaster House Constitution to the 2013 Constitution created legitimate hopes for transparency, democracy, respect of human rights and observance of principles of good governance (Moyo & Ncube, 2014). The new constitutional dispensation appeared to eradicate any scepticism that had been built due to the inadequacies of the Lancaster House Constitution to address issues centring on good governance and human rights protection (Nyabedze, 2015). The Lancaster House Constitution was a negotiated settlement that sought to balance the interests of Zimbabwe’s former colonial masters, Britain, and those of the independent African indigenes, Zimbabweans (Booyesen, 2003). It therefore is not surprising that the Lancaster House Constitution could not comprehensively reflect African legal, religious, and traditional norms and value systems. It is no wonder that when the Lancaster House Constitution was still enforceable, criminal activities, abuse of human rights and poor governance were

prevalent, prompting legal experts and socio-political analysts to conclude that the country needed a new constitutional dispensation to realise its socio-economic developmental goals, respect for human rights and compliance with good governance principles.

It is plausible to contend that the concerns raised around the shortcomings of the Lancaster House Constitution emanated from the observed continual decline of compliance with Unhu/Ubuntu principles in Zimbabwean societies (Nhemachena, 2014). The decline in Unhu/Ubuntu was underlined by an unjustifiable cycle of permissiveness of immoral practices such as adultery, fornication, and general dishonesty in the society, amongst others. Those in position of authority acted with impunity and total disregard of the best interests of their subjects. Questions therefore had to be raised as to whether or not the Lancaster House Constitution could still ensure the protection of human rights and dignity as well as good governance. In other words, could the aforementioned Lancaster House Constitution still promote Unhu/Ubuntu? Unhu/Ubuntu is a commonly shared ideal and value, which runs like a thread across African cultural lines (Mandova & Chingombe, 2013; Gordon, 1997; Ramose, 1999). It carries the purport and spirit of a universal ethos and should be in harmony with constitutional values enshrined in the Bill of Rights, in particular. Hypothetically, if Unhu/Ubuntu is construed to be in harmony with constitutional values, then the Zimbabwean society should exist in peace and harmony. Unhu/Ubuntu should be the basis of Zimbabwean law and indeed African law (Hapanyengwi-Chemhuru et al, 2016; Mapaure, 2011). Regrettably, this does not appear to be the case as Unhu/Ubuntu has been relegated to the peripheries by African governments and their societies who are forcibly being subjected to western acculturation.

The evident increasing absence of Unhu/Ubuntu values in the Zimbabwean and African societies is regrettable. Such absence is attributed to an upsurge in imported western legal norms that now characterize most Constitutions in Africa. This is a strange development, as the constitutional demands for respect for human rights should carry the very same values that the Unhu/Ubuntu seeks to instil in African societies (Mbigi & Maree, 1995). This could suggest that the western notions of constitutionalism might be void

of the intrinsic values espoused by Unhu/Ubuntu (Bondai, 2016). At the dawn of Zimbabwe's new era of constitutionalism in 2013, one would have envisaged that African law and legal thinking, and Unhu to the Zimbabwean jurisprudence, would be a part of the 2013 Constitution's source of democratic values. However, the infamous events of the 14th of November 2017 orchestrated by the Zimbabwe Defence Force, to illegally force a constitutionally elected President, Mr Robert Gabriel Mugabe out of office signified that Unhu/Ubuntu is yet to be embraced as a fundamental value of constitutionalism in Zimbabwe and the rest of Africa. Operating under the auspices of "Operation Restore Legacy," the Zimbabwe Defence Forces (ZDF) took control of Zimbabwe's capital Harare. Numerous Cabinet Ministers and other government officials were illegally detained. Mr Robert Gabriel Mugabe was placed under house arrest. The military mutiny was orchestrated in response to the dismissal of first Vice President Emmerson Damabudzo Mnangagwa for having conspired to remove a constitutionally elected head of State from office. The military mutiny later served as evidence of Mr Mnangagwa's sinister motives of removing a constitutionally elected president, Mr Robert Mugabe. Mr Mnangagwa is now the sitting head of State in Zimbabwe. Questions thus have to be raised of humaneness or Unhu of the evident coup de tat in Zimbabwe and its legal status under the Zimbabwean Constitution. At the centre of this approach is that if in accordance with African legal norms removing an elected leader from is immoral, in terms of the Constitution, the same conclusion must be arrived at. However, the fact that Mr Mnangagwa is now the sitting head of State on account of the military *coup de tat* which a Constitutional Court judge in Zimbabwe found to be "constitutional" signifies that Unhu/Ubuntu is not imbedded in contemporary constitutional values.

The ZDF's arguments aimed at invalidating the characterisation of their illegal conduct as a military coup have been strangely accepted by the African Union and western countries. However, many Africans who valued Mr Robert Mugabe's valiant efforts to empower the western impoverished Zimbabweans through a raft of radical government initiatives such as indigenisation and land reform programmes have pierced through the stinking veil of the ZDF's

operations and correctly branded their immoral intervention as a coup de tat. It must be pointed out from the onset that the African Union relies heavily on the west for its funding. The African Union, in a manner that is devoid of Unhu had to go against their own standing rules on the illegal removing of sitting heads of State in order to continue benefiting from the West's funding. Compromising adherence to standards for purposes of prostituting for favours is void of Unhu/Ubuntu moral values. The African Union, the western countries and China have accepted the ZDF's express invocation of the Zimbabwean Constitution to legitimise their immoral conduct. The then Commander of the armed forces of and now Vice-President of Zimbabwe, Dr Constantine Guveya Chiwenga quoted the preamble of the Zimbabwean Constitution to justify the military action. He advocated for the success of the military operation in order to, "...allow Zimbabweans to enjoy their freedoms and rights as enshrined in the national Constitution." Therefore, questions have to be raised as to whether or not African legal principles espoused by Unhu/Ubuntu were considered in the drafting of the 2013 Zimbabwean constitution.

Dr Sibusiso B. Moyo a retired Major General of the ZDF, who at the time was serving as the spokesperson of the ZDF and is now the Minister of Foreign Affairs and International Trade, read a statement to the effect that, the ZDF were "only targeting criminals around [President Mugabe] who are committing crimes that are causing social and economic suffering ... in order to bring them to justice." The statement went on to reassure civil servants, the judiciary and members of parliament that the military action was intended to enable them to fulfil their constitutional roles and that "people should enjoy their rights and freedoms". The emergency situation prompting Dr Sibusiso B. Moyo's remarks could only be issued during a period of public emergency in terms of section 87 of the 2013 Constitution. For such a period of public emergency to be declared, a written law published in the Government Gazette is a prerequisite. Such law must provide for the measures to deal with the public emergency in question. The 2013 Constitution strangely does not state who has the powers to declare a public emergency. In the absence of a delegating provision section 117(2) (b) of the 2013

Constitution offers guidance as to who has the capacity to declare a public emergency. Parliament is the repository of law-making power and not the ZDF. In the African legal context usurping powers, which are not vested in an individual, and purporting to act in manner that suggested the presence of such power to act in such manner signifies lack of Unhu/Ubuntu. The military conduct should have been regarded as being unconstitutional.

In Shona, one would conclude thus, “*zvakaikwa nemasoja nevatungamiriri vavo hazvina unhu*,” which is translated to mean that what the military and its leadership did lacks humaneness. In a manner reminiscent of the colonial era, the ZDF occupied public spaces and state property, detained the constitutionally appointed President and other high-ranking government officials and took control of the Zimbabwe Broadcasting Corporation (the national broadcaster). By so doing, the ZDF action violated the rights of personal security (section 52 of the 2013 Constitution), arrested and detained persons (section 50 of the 2013 Constitution), assembly (section 58 of the 2013 Constitution), movement (section 66 of the 2013 Constitution), protest (section 59 of the 2013 Constitution) and expression, especially media freedom (section 61 of the 2013 Constitution), and rights to personal liberty (section 49 of the 2013 Constitution). The ZDF action also threatens to worsen socio-economic conditions in the country and therefore to violate the rights to education, healthcare, food and water (sections 75-77 of the 2013 Constitution).

The ZDF refuted that the socio-economic conditions would worsen yet a review of the first 100 days of Mr Mnangagwa in office signifies a failure to address the economic hardships that were being faced during the reign of Mr Mugabe. In fact, the economic situation has worsened. The Unhu/Ubuntu philosophy dictates that one should not impoverish the masses in pursuit of petty egocentric interests. Surely one cannot justify constitutional violations as a necessary evil to remove a government that failed to deliver on its mandate due to sanctions and poor governance (See section 3(1) (b) of the 2013 Constitution). One cannot violate a founding value of the Constitution to justify their unlawful conduct, *hazvina Unhu* (it is immoral). The ZDF conduct perpetuates a cycle of lawlessness yet

the thrust of the 2013 constitutional dispensation was to ensure an era underlined by commitment to the observing the rule of law *neUnhu* (and humaneness). This chapter will therefore examine the significance of Unhu/Ubuntu to Zimbabwe's constitutional jurisprudence. It will also point to the importance of Unhu/Ubuntu to Africans' aspirations of realising peaceful and successful societies. Without Unhu/Ubuntu, African countries will continue to suffer whilst pursuing the so-called "civilised" western constitutional values, which legitimised an illegitimate military action in Zimbabwe.

Unhu/Ubuntu: A Brief Overview

Unhu/Ubuntu is an African philosophy of life (Shutte, 1993; Shutte, 2001; Samkange & Smakange, 1980), which represents humaneness and morality. Unhu/Ubuntu focuses on the pursuit of societal or community goals/objectives in a collective manner. The ethos of collectivity is regarded as the fundamental component for ensuring African communities' survival. Such collective survival is premised on the maxim *munhu, munhu nekudakwekuvapo kwevamwe* (you are because I am). As such, for an individual to survive, he or she needs the existence of others (Khoza, 2012). Individualism is not a priority in African legal value systems as it is in western countries. The African legal system emphasizes on the humanistic inclination of a human being towards other human beings and not self (Murithi, 2006; Mtemba, 1996). As such, one cannot use the collective to pursue his or her own narrow interests or to settle a score with another party. In order to put across a proper conceptualization of Unhu/Ubuntu, Kunene, argued that:

... it is not enough to refer to the meaning and profound concept of [Unhuism]/Ubuntuism merely as a social ideology. [Unhu]/Ubuntu is the very quality that guarantees not only a separation between men, women and the beast, but the very fluctuating gradations that determine the relative quality of that essence. It is for that reason that we prefer to call it the potential of being human (Kunene, 1996).

Kunene elaborates that the potential of being human relies on a constant harmony between the physicality and spirituality of life. The harmony between physicality and the spirituality of life can only be realised through working closely and in sympathy with other human beings. As such, the maxim you are because I am is continuously challenged through one's interactions with others in the collectivity. Those who disregard the wishes of others in pursuit of their narrow interests practically fail to achieve self-fulfilment through a set of collective social ideals. Instead, they choose to violate other people's interests to gain an unlawful advantage over others. Unhu/Ubuntu thus places significance on realising social value and not selfish personal interests (Koka, 1996; Kaputa, 2011). Failing to conform to social rules and disciplinary mechanisms, inability to respect human dignity and life, manipulating others for selfish interests and pursuit of self-interests as opposed to collective unity are practices, which do not signify Unhu/Ubuntu values.

Unhu/Ubuntu's value has been considered as, "... a basis for a morality of co-operation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood, all the time emphasising the virtues of that dignity in social relationships and practices" (Khomba, 1996; Venter, 2004). In order to realise an orderly society, Unhu/Ubuntu was a prized value, an ideal to which age-old traditional African societies found no particular difficulty in striving for (Hapanyengwi-Chemhuru and Shizha, 2012; Forster, 2007). Sadly and to the detriment of the westernized African societies, the suitability of the original Unhu/Ubuntu principles and practices to contemporary legal regimes has frequently been unjustly questioned to the detriment of the continent. Africans must re-establish contact with Unhu/Ubuntu principles in order to realise justice and fairness in their communities (Chitumba, 2013; Eze, 2008; Chilisa, 2012). But then, how often have we been told that the imposition and assimilation of western legal norms and culture in African societies is the hallmark of civilization? This shallow and naïve construction serves as reason why Africa has lost its moral campus and is now a perennial fiefdom of imperialism. For African countries to progress, the cultural differences between societies in the continent and western societies must be

acknowledged as a basis towards formulating contextually relevant legal frameworks, which can bring about order in the African societies (Bhengu, 1996; Broodryk, 2006). To justify this assertion, Chief Justice Mahomed whilst addressing the World Jurist Association Seminar in Cape Town summed up the significance of African values as follows:

... the ageless emotional and cultural maturity of Africa is less dramatic but not less significant or potentially powerful in influencing, in shaping and in formulating the constitutional ethos which must inform and define judicial responses to jurisprudential challenges arising from competing demands in a complex and rapidly changing society. That maturity expresses itself through a collectivist [emotion] of communal caring and humanism, and of reciprocity and caring (Mokgoro, 1998).

As things stand, African legal systems can best be described as typifying order in chaos. Unhu/Ubuntu values are continuously frowned upon by an influential yet misguided and western as well as Asian captured African citizenry. In the case of *Zimmat Insurance Company Limited v Chawanda* 1990 (2) ZLR 143 Gubbay ACJ as he then was stated that, "... law in a developing country cannot afford to remain static...it must adapt itself to fluid economic and social norms and values and to altering views of justice." The same sentiments were echoed by Kentridge AJ (as he then was) in *Duplessis and Others v Deklerk and Another* [1966] ZACC 10, 1996 (3) SA 850 quoting *R v Salituro* (1992) 8 C.R.R. 2nd 173 when he remarked that:

Judges can and should adapt the common law to reflect the changing, social moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. None the less there are significant constraints on the power of the judiciary to change the law ... in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform ... The judiciary should confine itself to these incremental changes which are necessary to keep

the common law in step with the dynamic and evolving fabric of our society.

There is therefore need for African societies to trace back to their roots and identify their morality inducing legal systems. The west and Asia will continuously benefit from the misdirected importation of their legal systems by naive Africans.

Unhu/Ubuntu and Zimbabwean Customary Law

Customary law and its application have a constitutional status in Zimbabwe. Sections 162(g), 174(b), 176 and 282(e), recognise the customary law institutions and the systems of customary law that they observe. Courts are specifically enjoined to apply customary law where it is applicable, and do so subject to the Constitution and applicable legislation. The 2013 Constitution places emphasis on ensuring that customary law principles are not given marginal development. Regrettably, the Customary Law of Zimbabwe is limited in scope in its application (Section 3 of the Customary Law and Local Courts Act). Section 193 of the 2013 Constitution provides that customary law does not cover criminal matters and is strictly limited to marriage, inheritance and guardianship matters only. Customary law which is the formally recognised positive law is useful in so far as offering guidance on transition of leadership in traditional African societies is concerned (Hinz, 2008; Fletcher, 2006). To that end, Unhu(-ism) /Ubuntu(-ism), which is central to age-old African custom and tradition is abound with values and ideas which have the potential of shaping not only current indigenous law institutions (Sogolo, 1993; Taylor, 2014; Teffo, 1998; Teffo 1996), but Zimbabwean jurisprudence as a whole. For example, in the traditional African society, the reign of particular king, however loved or despised, was never more significant than the endurance of the kingdom itself. African institutions and societies were of very high moral standard and authority whose main preoccupation was protection and safeguarding of the Kingdom as distinguished from the king, interests of the ordinary person, and the land (Williams, 2003).

Trying to remove a sitting King would be met with the retribution that it deserved. It is in this regard that Zimbabwean indigenous laws could be relied upon to affirm the resiliency, relevance and legitimacy of African legal institutions in the socio-cultural, political and economic lives of Africans. If Zimbabwe, and indeed African nations, seek to develop and strengthen capable States, there is need to recognise African legal norms at the same level as modern constitutional law (Mamdani, 1996; Yoder, 1998). Such an approach will lead to the development of homegrown African States grounded on indigenous social values and contexts, whilst adjusting to the changing realities infused by westernisation. The shared values of Unhu(-ism)/Ubuntu(-ism) and the Constitution and in addition, the significant and effective approaches, methods, techniques and strategies of the former are likely also to become central in shaping and formulating a new indigenous law and jurisprudence that meet the demands and challenges of constitutionalism for indigenous law (Mokgoro, 1998). How exactly these values can be utilised to inform jurisprudential responses to the current challenges brought about by competing demands in a complex and rapidly changing Zimbabwean society, will require close examination of current shortcomings of existing institutions, their mechanisms and strategies.

Unhu/Ubuntu and the 2013 Zimbabwean Constitution

The 2013 Constitution is the supreme law of the Republic of Zimbabwe. It was voted for and approved in a referendum of 16 March 2013. Before the 2013 Constitution, Zimbabwe used a constitution negotiated at the 1979 Lancaster House Agreement. The constitution often represents the legal convictions of the community. It reflects those values that are held dearly by a society. To that extent, in deciding whether Unhu/Ubuntu is constitutional recognised or otherwise, while appreciating and respecting foreign jurisdictions' perceptions on the concept, the decision to be adopted should be contextualised to reflect the legal convictions and societal values. Section 2 (1) of the 2013 Constitution is relevant and speaks volumes in respect of societal values. It reads:

This constitution is the supreme law of Zimbabwe and any law, practice, custom or contract inconsistent with it is invalid to the extent of the inconsistency. The obligations imposed by this constitution are binding on every person natural or juristic, including the state and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.

Section 3 of the 2013 Constitution, outlines the values and principles on which the constitution is founded. A reading of the whole section clearly reveals that the constitution recognizes and accepts that the Zimbabwean moral fabric is engraved in the country's culture, religion and traditional values. Any development of the common law therefore ought to be underpinned on the interests of justice, and of course, in conformity with the Constitution. Unhu/Ubuntu is entrenched deeply in the country's culture, tradition and religion and its protection by the Zimbabwean courts should not be a matter of debate. Examples in which the Zimbabwean courts frowned upon human conduct that is devoid of Unhu/Ubuntu can be found in the cases of *Katsumbe v Buyanga* 1991 (2) ZLR 256 and *Mapuranga v Mungate* 1997 (1) ZLR 64. In both cases, the courts frowned on the wrongfulness of adultery in so far as it is a threat to the marriage institution. In other words, Malaba J was of the view that adultery is a conduct that is void of Unhu/Ubuntu in the African society.

Whilst some African societies such as Namibia and South Africa have followed western countries such as the United Kingdom in abolishing third party claims on adultery, in a manner that signifies lack of Unhu/Ubuntu, Malaba J (as he then was) in the *Mungate* case held: "Adultery is still prohibited by public opinion as an act of sexual incontinence." Given that the 2013 Constitution is an outcome of a people driven process which took place in Zimbabwe, the observation by Malaba J (as he then was) regarding the marriage institution (Section 78 thereof recognizes the marriage institution) also applies to the significance of Unhu/Ubuntu in the same Constitution. This gives a public complexion to Unhu/Ubuntu. The nation of Zimbabwe has a duty to protect the moral values espoused by the philosophy of Unhu/Ubuntu and obviously, any parties

disregarding the values of Unhu/Ubuntu must be held accountable just like a person who violates a marriage institution (Wasosa, 2014).

The forcible removal of a sitting head of State, Mr Robert Mugabe raises both constitutional and moral questions, premised on the philosophy of Unhu/Ubuntu. The 2013 Constitution of Zimbabwe provides for the removal of the President or Vice-President from office through a resolution by one half of the total membership of Members of Parliament. Section 97 of the 2013 Constitution provides as follows:

1. The Senate and the National Assembly, by a joint resolution passed by at least one-half of their total membership, may resolve that the question whether or not the President or a Vice-President should be removed from office for –

- a. serious misconduct;
- b. failure to obey, uphold or defend this Constitution;
- c. wilful violation of this Constitution; or
- d. inability to perform the functions of the office because of physical or mental incapacity;

.. should be investigated in terms of this section.

2. Upon the passing of a resolution in terms of subsection (1), the Committee on Standing Rules and Orders must appoint a joint committee of the Senate and the National Assembly consisting of nine members reflecting the political composition of Parliament, to investigate the removal from office of the President or Vice-President, as the case may be.

3. If -

a. the joint committee appointed in terms of subsection (2) recommends the removal from office of the President or Vice-President; and

b. the Senate and the National Assembly, by a joint resolution passed by at least two-thirds of their total membership, resolve that

the President or Vice-President, as the case may be, should be removed from office; the President or Vice-President thereupon ceases to hold office.

The wording used in section 97 of the 2013 Constitution clearly points to the fact that any such person who sought to remove Mr Robert Mugabe from the position of president must have been of a higher moral standard as compared to the accused. The principles of Unhu/Ubuntu dictate that one cannot accuse a person who has a speck in the eye of being at fault whilst the accuser has a log in the eye (See Mathew 7:3. Unhu/Ubuntu and religion are interconnected). Even the western Cleans Hands Doctrine demands that he who comes to equity must come with clean hands (See the famous English case, *Everet v Williams*, Ex. 1725, (L.Q. Rev. 197). However, the parties that orchestrated the removal of Mr Mugabe from office violated constitutional provisions by using a coup to ascent to power. The poor attempt at legitimising the coup through the use of an impeachment process again fell short of the principles of Unhu/Ubuntu. Most of the individuals driving the impeachment process could be regarded as political prostitutes whose moral campus must be questioned. After all, the same persons moving a motion for impeachment in order to camouflage a military coup were the same persons who had voted for the dismissal of the beneficiary of the military coup, and now President of Zimbabwe, Mr Emmerson Mnangagwa's ouster from the ruling party Zimbabwe African National Union-Patriotic Front (Zanu-PF). The same parties had cheered when Mr Mnangagwa was dismissed from his position as the Deputy President of Zimbabwe for having plotted to unconstitutionally remove a constitutionally elected head of State. After the fact, the allegations levelled against Mr Emmerson Mnangagwa, which prompted his dismissal, have turned out to be true. He did indeed remove the head of State contrary to his dishonest denial of the charges levelled against him. In circumstances where a party is prepared to violate the constitutional rights of another, they must not be seen to complain of their dignity being impaired when they would have violated the very institution they vowed to protect through the constitutional values. The removal of

a head of State in the Zimbabwean context is an attack on the dignity of the innocent party. The dignity of the political adulterer ought not to be more important than that of an innocent party whose rights are protected by the Constitution. The dignity and right to privacy of all citizens is not absolute as the constitution, in section 86 is instructive on limitation of fundamental Human Rights and Freedom. Section 86 (1) and (2) is instructive. It reads:

1. The fundamental rights and freedoms set out in this chapter must be *exercised reasonably and with due regard for the rights and freedoms of other persons*.

2. The fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity equality and freedom, taking into account all relevant factors including (a) the nature of right or freedom concerned (b) the purpose of the limitation, in particular whether it is necessary in the interest of ... public morality ... or the general public interest.”

It is thus evidently clear that rights, as given by the 2013 Constitution have to be responsibly enjoyed. A group of people cannot seek to unlawfully limit the constitutionally protected rights of another and endanger the lives of the majority in pursuit of unconstitutionally protected interests (Head, 2002). Clearly, such an approach is void of Unhu/Ubuntu and is simply an immoral conduct. Everyone has the duty to respect the fundamental human rights and freedoms as entrenched in the constitution (Bekink, 2005). In *casu*, the coup plotters’ rights to dignity, privacy and equality before the law, were on the face of it not the same rights as Mr Mugabe’s rights upon being balanced. The 2013 Constitution did not aim at ushering in another dispensation of a deeply divided Zimbabwean society characterised by conflict, strife, injustice and untold suffering of Zimbabwean citizens. The 2013 constitution was founded on the recognition of peaceful co-existence in line with the principles of Unhu/Ubuntu. A tone of socio-political transformation was set by

the 2013 Constitution (Hofisi & Feltoe, 2016). In principle, the 2013 constitution could be interpreted as demanding the recognition of Unhu/Ubuntu and not victimisation of constitutionally protected political foes. The forced removal of a sitting head of State prompts the wise in the Zimbabwean society to decry the loss of Unhu/Ubuntu.

The 2013 Constitution of Zimbabwe was not passed for the purposes establishing a free-for-all anarchist society where rights and freedoms are exercised freely with total disregard (Chinhengo, 2017). It did not envisage a society run on the basis of order in chaos. The basic values of the 2013 Constitution as a whole, the clearly identifiable values in the preamble and the postscript create a value system in terms of which rights and freedoms are to be claimed and exercised. Finally aware of the potential for disorder that the guarantee of rights and freedoms may have after decades of oppression and repression, these guiding values aim to set the tone for peaceful co-existence. The 2013 Constitution specifically required the need for Unhu/Ubuntu but not victimisation (Maja, 2017). The values of Unhu/Ubuntu are therefore an integral part of that value system which was established by the 2013 Constitution (Mugumbate & Nyanguru, 2013). Where it concerns the exercise and enjoyment of individual human rights and freedoms the 2013 Constitution also did not establish a system where these rights and freedoms are exercised and claimed willy-nilly despite the claims and existence of concomitant rights of others. The limitations clause, which was a rights-balancing mechanism, made specific provision for criteria to be considered when conflicting rights and interests are claimed. It was therefore also a mechanism for peaceful co-existence between individual claimants. What is evident nevertheless is that a party who seeks to pursue an unconstitutional objective such as a military coup cannot be regarded as having equal rights as compared to a constitutionally appointed victim (Lenoir, 2017; Omotola, 2011). To contend so is to lack Unhu/Ubuntu.

The founding values of the democracy established by the 2013 Constitution, viz-a viz human dignity, equality, promotion of human rights and freedoms and multi-party democracy to ensure accountability, responsiveness and openness and the rule of law,

arguably coincide with some key values of Unhu(-ism)/Ubuntu(ism), for example human dignity itself, respect, inclusivity, compassion, concern for others, honesty and conformity. At the same time, the Unhu/Ubuntu values of collective unity and group solidarity can translate into the spirit of national unity demanded of the Zimbabwean society. The collective unity, group solidarity and conformity tendencies of Unhu/Ubuntu can surely be harnessed to promote a new patriotism and personal stewardship so crucial (for a number of reasons) in the development of democracy. A number of similar survival issues in the law itself brought about by the challenges of constitutionalism, are easily identifiable (Vieira & Da Silva, 2013). It is around these that law reform can harness the spirit of Unhu(-ism)/Ubuntu(ism) to achieve appropriate responses to the demands of constitutionalism. Whether it is for purposes of promoting the values of the Constitution by translating them into more familiar Unhu/Ubuntu values and tendencies, or whether it is for purposes of harnessing some unique Unhu/Ubuntu value, tendency, approach and/or strategy, or further whether it is for purposes of promoting and/or aligning these aspects of Unhu/Ubuntu with core constitutional demands Unhu(-ism)/Ubuntu(-ism), it seems, can play an important role in the creation of responsive legal institutions for the advancement of constitutionalism and a culture of rights in Zimbabwe.

Unhu/Ubuntu and the African Union's Stance on Unconstitutional Changes of Governments

The African Union has a standing rule to the effect that under no circumstance should a forceful change of government be condoned on the continent (African Union Handbook, 2014). Some might want to argue that the events that unfolded in Zimbabwe did not amount to a coup de' tat but were just but a "smart" bloodless transition of power (Taylor, 2017; The Zimbabwean, 2017). It is our argument that the coup de' tat in Zimbabwe was illegal regardless of whether it was smart or forceful. Reference can be made to the Democratic Republic of Congo scenario in which Mr Joseph Kabila has overstayed in the presidency beyond his allotted two terms of office (The Economist,

2018; Katombe, 2016). His second term of office expired on the 20th of December 2016 yet he is still clinging on to power with hope of getting a fourth term in office. It is immoral and therefore unconstitutional for one to interpret the Constitution in such a way as to be allowed to have a third term contrary to the spirit of the Constitution. Regardless of how one tries to justify their conduct, violating constitutional provisions signifies lack of Unhu/Ubuntu. People have since died in clashes prompted by citizens' demonstration against Mr Joseph Kabila's unconstitutional clinging on to power (Chutel, 2016).

Whilst in the Democratic Republic of Congo the issue at hand relates to a president who is refusing to relinquish power, unconstitutionally so, the events that unfolded in Harare related to military officials who without a constitutional basis, seized power from an elected president, Mr Robert Mugabe, and handed it over to a person who was not elected by the people and had been dismissed as a government official and party member (Burke, 2017; Dzirutwe, 2017). How can such a process be deemed is legitimate? It is undisputable that the military intervention was not constitutional and lacked Unhu/Ubuntu. The military coup was and remains illegal and is against the African spirit of Unhu/Ubuntu, even if many Zimbabweans were euphoric about the coup. How can a reasonable man celebrate the illegal elevation of a person who is accused of human rights atrocities popularly known as the Gukurahundi genocide? After all, the same persons elevated to key government positions were part of the system that presided over the suffering of the masses, a matter that they now purport to seek to remedy (Allison, 2017). *Hazvina Unhu mukati izvi* (this conduct lacks humanness). After all, the beneficiary of the coup, Mr Emmerson Mnangagwa, was the brains behind the unconstitutional act of the military (Abricius, 2017; BBC, 2017). Mr Emmerson Mnangagwa is quoted as having said: "I was in constant contact with the service chiefs throughout" (New Zimbabwe, 2017). When did the contact with the Service Chiefs begin? Logically, it can be argued that the contact began following the removal of Mr Emmerson Mnangagwa from office as Vice President. It could also be inferred that Mr Emmerson Mnangagwa was working with the military to forcefully

remove Mr Mugabe from power regardless of his dismissal as the Vice President.

What therefore is the African Union's position regarding this Unhu/Ubuntu void coup? The Organisation of African Unity (OAU), as it then was known articulated a general policy against unconstitutional changes of government. At the OAU Assembly meeting at Algiers, Algeria, in July 1999, the Assembly declared that several governments that had come to power through unconstitutional means since the Harare summit should restore constitutional legality by the next annual summit in 2000 (Boulden, 2013). These states were Comoros, Congo Brazzaville, Guinea Bissau, and Niger. Then, at Lomé, Togo, in July 2000, the OAU Assembly adopted the Declaration on a Framework for Response to Unconstitutional Changes of Government (the Lomé Declaration) (Omotola, 2011; Makinda & Okumu, 2008). In the Lomé Declaration, the OAU Assembly set out a new approach to coups: We express our concern about the resurgence of coup d'état in Africa.

We recognize that these developments are a threat to peace and security of the Continent and they constitute a very disturbing trend and serious setback to the ongoing process of democratization in the Continent ...We reaffirm that coups are sad and unacceptable developments in our Continent, coming at a time when our people have committed themselves to respect of the rule of law based on peoples' will expressed through the ballot and not the bullet (See the Lomé Peace Agreement of 7 July 1999 and the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI), 11 July 2000a).

The OAU's commitment was especially noteworthy because many of the OAU's member state governments themselves assumed power through military coups (Omorogbe, 2011). The Lomé Declaration defined several situations that constitute an unconstitutional change of government:

- i) a military coup d'état against a democratically elected Government;
- ii) intervention by mercenaries to replace a democratically elected Government;
- iii) replacement of a

democratically elected Government by armed dissident groups and rebel movements; iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections (Ibid).

The Lomé Declaration provided a variety of sanctions that could be taken incrementally in response to unconstitutional change. In the initial stage, the OAU would condemn the coup and refuse to recognize the government. Next, the perpetrators would be given up to six months to restore constitutional order, during which time the unconstitutional government would be suspended from OAU policy organs. After the six-month period, the OAU could impose targeted sanctions, including visa denials, restrictions on government-to-government contacts, and trade restrictions. The primary responsibility for implementing the Lomé Declaration belonged to the Central Organ of the OAU Mechanism for Conflict Prevention, Management, and Resolution. Thereafter, the Central Organ systematically condemned the successful coups that took place in the Central African Republic (CAR) (2003), Guinea Bissau (2003), and São Tomé and Príncipe (2003). Although the AU was formally established in July 2002, the OAU continued to exist until July 2003. By then, all fifty-three OAU member states-every state in Africa other than Morocco-ratified the Constitutive Act.

In the field of peace and security, the key AU body is the Peace and Security Council (the PSC), which was established by the Protocol Relating to the Establishment of the Peace and Security Council of the African Union (the PSC Protocol). The PSC Protocol was adopted pursuant to Article 5(2) of the AU Constitutive Act and entered into effect on December 26, 2003, after the deposit of instruments of ratification by a majority of the member states of the AU.

The PSC formally launched on March 25, 2004, at which point the peace and security responsibilities of the Central Organ of the AU-including responsibilities under the Lomé Declaration-came to an end. By February 2010, the PSC Protocol had fifty signatories and forty-four ratifications. The PSC has fifteen members, all of whom are chosen by the Executive Council based on equitable regional

representation and rotation. One of the criteria for choosing prospective states is, “respect for constitutional governance, in accordance with the Lomé Declaration, as well as the rule of law and human rights” (Omorogbe, 2011). Each PSC member has one vote. Where the PSC fails to reach a consensus, a two-thirds majority is required on substantive matters. The PSC acts on behalf of all AU members. PSC decisions are binding, and the Protocol provides that member states “agree to accept and implement the decisions of the PSC” and “extend full cooperation to, and facilitate action by the Peace and Security Council” in performing its duties in the “prevention, management and resolution of crises and conflicts ...” (Omorogbe, 2011). Although the Protocol provides the mechanism for the implementation of the principles in the AU Constitutive Act (Packer & Rukare, 2002), it is a separate treaty. Despite this distinction, the PSC practice has been to impose measures and sanctions against any member state in which a coup occurs, even if the nation has not ratified the Protocol. As an example, the PSC imposed sanctions on Mauritania in 2005 even though it had not ratified the Protocol (Mauritania signed in May 2003 and ratified in July 2008) (Ibid). The PSC then imposed sanctions on Guinea in 2009 (Guinea signed in July 2002, and has yet to ratify). One argument supporting the PSC position is that these states were bound by their signature not to undermine the Protocol. Alternatively, it could be argued that the PSC is simply the mechanism through which the AU responds to unconstitutional acts that are prohibited by the Constitutive Act, which all member states have ratified (Ibid).

Regardless of the clearly outlined anti-coup stance of the AU, it surprisingly declared the military intervention legitimate. As a result of its shocking resolution regarding the Zimbabwean military coup, the AU’s legitimacy is now under serious threat. The AU contravened its anti-coup dictum and the African spirit of Unhu/Ubuntu by legitimising the coup in Zimbabwe. The AU’s strange decision signifies the dangers of captured African governments and regional/continental institutions (Chirisa *et al*, 2014). Several activities of the AU are funded by western countries (Mataboge, 2015; Kagire, 2016). Most of these countries, in particular the United States of America and the United Kingdom had long been working to remove

Mr Mugabe from power with little success (Smith, 2013). The reason for the western countries' desire to remove Mr Robert Mugabe from power was his radical stance in favour of indigenisation policies and the land reform programme (Mushakavanhu, 2015). These policies threatened the western agenda of impoverishing the African continent through exploiting its resources using transnational corporations and state capture (Obi, 2010; Hirono & Suzuki, 2014; Makumbe, 2011; Fowale, 2010; Guvamatanga, 2009).

Mr Mugabe's radical economic policies saw sanctions being imposed against Zimbabwe as a means to forcing him out of power through Zimbabweans turning against him (Hove, 2012). Up until the coup, the western approach had dismally failed with Mr Robert Mugabe's ideology being well received in African countries such as South Africa and Namibia, just to name but a few (Share, 2016; Maodza, 2013). When the opportunity to get rid of Mr Robert Mugabe presented itself, the morally bankrupt westerners supported the illegal military intervention as it suited their parochial business interests (The Zimbabwean, 2018). The AU gripped by the begging syndrome naturally followed the stance taken by the western countries regardless of its moral bankruptcy. The idea here is not to support Mr Mugabe's "misrule" in selected instances. The idea is to ensure procedural correctness of transition of power as failure to adhere to constitutionally set rules will lead to anarchy in Africa. The Democratic Republic of Congo is a case in point as is the South Africa where Mr Jacob Zuma had to be forced to leave office after the Constitutional Court had long pronounced him guilty of his breach of oath of office. It is deeply disturbing that the AU is not capable of applying its own rules consistently. How can such a spineless and Unhu/Ubuntu void institution chart a new road map for a decolonised growth path for Africa?

Africa has for long been a hotbed of coups characterised by a faction within government using its partial control of the state apparatus (military) to (forcibly) remove the ruler from power. This development is similar to the "smart coup" that took place in Zimbabwe to depose Mr Robert Mugabe from power, in the process ending his 37-year stay in office. The coups subsequently ushered in eras of chaos and untold suffering for African indigenes due to the

resultant undermining of democracy, Unhu/Ubuntu values, fuelling of civil wars and insecurity, and interruption of economic growth. During the period 1950 and 2010, an estimated 169 coup attempts were registered in Africa. An estimated 52 percent of the coups were successfully executed, as was the case with the Zimbabwean military coup. At the time, the OAU had a capital city rule, which provided that the party in control of the country's capital city, regardless of how such control was assumed, was recognised as the legitimate representative of the country. This approach symbolised order in chaos or *ordo ab chaos* in Africa.

The African Union's desire to get rid of Mr Robert Mugabe in line with western interests led to the legitimising of the use of force in an illegal manner to assume political ascendancy. This is contrary to the African spirit of Unhu/Ubuntu. Some might want to justify the use of force to remove Mr Robert Mugabe on account of his supposed "dictatorial" leadership. However, what many forget is that Mr Robert Mugabe, after his loss to the late former Prime Minister of Zimbabwe Mr Morgan Tsvangirai in the 2008 plebiscite, was willing to leave office. The military rejected his request to relinquish power to Mr Morgan Tsvangirai prompting a power sharing agreement through the Government of National Unity agreement brokered by the dithering AU through Mr Thabo Mbeki, the former South African president. Mr Robert Mugabe's desire to relinquish power is a known in the government circles, including the coup plotters and resultant beneficiaries of the same process. The coup plotters were power hungry and were not ready to relinquish power to an overwhelmingly popular opposition party, the Movement for Democratic Change. In fact, most of the atrocities that are now erroneously attributed to Mr Robert Mugabe were planned and executed by the coup plotters and implementers. As such, the AU rubber stamped a cabal of notorious violator of the constitution and legitimised illegality. This is contrary to the spirit of Unhu/Ubuntu.

African regional organisations and their member states only began to shed their indifference to forcible seizures of power and to rethink the capital city rule around 1996-1997, after coups in Burundi and Sierra Leone toppled elected governments and destabilised conflict management efforts. This resulted in the landmark Lome

Declaration by the OAU in 2000, in which African states collectively denounced coups as grave threats to peace and democracy on the continent. The founding of the African Union (AU) in 2002 consummated the renunciation of the capital city rule. The AU's Constitutive Act included a provision to decertify governments that come "to power through unconstitutional means". The AU empowered its Peace and Security Council (PSC) - the key enforcement organ of the regional organisation - to use sanctions and suspensions to police unconstitutional changes of government. Over the last fifteen years, the AU has suspended no fewer than 11 member states when groups within violated its anti-coup rule. Moreover, the PSC has been quick to sanction such transgressions, usually acting within 24 to 48 hours of a coup.

Despite these gains, there are significant loopholes in the AU's anti-coup regime. Firstly, anti-incumbent forces can still use coups to unseat rulers. Secondly, the AU has been much weaker in holding incumbents to account for undermining constitutionalism than their rivals who try to seize power via coups d'état. This imbalance is not due to a lack of rules but a lack of Unhu/Ubuntu by the AU. The AU, in the 2007 African Charter on Democracy, Elections and Governance, empowered the PSC to police incumbent "infringements on the principles of democratic change of government" (Article 23, Section 4) as it would coups (Article 23, Section 1). Yet, not once has the AU invoked Section 4 - despite innumerable incidences of incumbents transgressing principles of democratic change of government. The contradictions plaguing the AU's regime of constitutionalism were laid bare in Zimbabwe when a power-struggle within the ruling party exploded into a pitched battle for control of the executive. The ZDF, responding to the dismissal of one of its key allies, Mr Emmerson Mnangagwa, and direct threats to its Commander, Constantine Chiwenga launched "Operation Restore Legacy" to eliminate its rival faction and assume de facto power.

After years of ignoring President Robert Mugabe's purported subversion of democracy, which the same parties were full responsible for, the AU was staring at a situation in which a coup had the potential to usher in a political transition in Zimbabwe that was

popularly supported by the western countries and China. The ZDF avoided crossing the AU's red line of seizing executive power - instead deferring to formal, constitutional procedures for the removal and replacement of Mugabe as president. It is important to observe that people who lie their way to power are not honourable men and lack Unhu/Ubuntu. Simply put, they are immoral. In line with African values and in a true Unhu/Ubuntu spirit, the AU should have condemned the *de facto* coup through the PSC, as it would have done in the case of a *de jure* coup. Thereafter, the AU should have proceeded to notify the rogue elements orchestrating the coup with a threat to suspend Zimbabwe from the AU until the military released Mugabe from house arrest, handed over power to a transitional post-Mugabe government, and returned to the barracks. The AU in its typical fashion of ineffective quiet diplomacy allowed events to unfold on the supposed belief that the coup was not bloody. Accounts on the ground suggest that many state security agents sympathetic to Mr Robert Mugabe were ruthlessly eliminated. The AU chose to play a blind eye to these realities.

In a hypocritical manner, the AU's PSC tacitly supported the forcible removal of Mugabe from power. This approach was in stark contrast to the AU's immediate and forceful rejection of virtually every other coup since it was founded in 2002. To justify its inaction, the AU ultimately declared the ZDF intervention did not constitute a coup d'état, after at first suggesting the opposite. The AU, in alignment with the Southern African Development Community, erred and missed a valuable opportunity to strengthen and expand its anti-coup regime to include both *de jure* and *de facto* coups. In narrowly focusing on the removal of the sitting head of state as the defining feature of a coup rather than the unconstitutional use of force to coerce elected leaders to relinquish power, it sets a dangerous precedent that threatens to undermine the strong gains the region has made to move beyond politics by the gun. This approach again is contrary to the African spirit of Unhu/Ubuntu.

The AU endorsed a factional coup by the Zimbabwe military and Mr Emmerson Mnangagwa, which now sees the coup perpetrators in key positions in the post-Mugabe government in direct contravention of the African Charter on Democracy, Elections and

Governance (Elich, 2017; Dendere, 2017). There is another important lesson for the AU from the Zimbabwe case. It would not have faced the unpalatable choice of greenlighting the forcible removal of a sitting head of state if it committed to building a more balanced regime of constitutionalism and Unhu/Ubuntu, in which incumbent subversions of African values of humaneness and democracy are addressed as vigilantly as coups by anti-incumbent forces. Through the violation of term limits, the disregard of Unhu/Ubuntu principles, the emasculation of free and fair elections, and the persecution of their opponents, rulers are eviscerating the institutions that are essential to building a new political equilibrium in which the use of force is not needed to hold incumbents accountable. Only by fixing the loopholes that currently plague the AU's regime of constitutionalism and African values espoused by Unhu/Ubuntu - rejecting de facto and de jure coups and ending the double standards that let incumbents but not their rivals off the hook for undercutting democracy - will the region finally escape politics by force.

Many western oriented Africans have argued that Mr Robert Mugabe was very dictatorial, when he was in power (Kirchick, 2007; Osborne, 2017). Whether or not he was, was his successor, Mr Emmerson Mnangagwa, not part of his government during the alleged period of dictatorship? If he was, and true enough, what role did he play in the matter in his capacity as Vice President? In fact, Mr Emmerson Mnangagwa's given nickname is Ngwenya, meaning a crocodile (Onuh, 2018; De Freytas-Tamura, 2017). For the Zimbabweans, the nickname is to recall his fearsome power and ruthlessness when he directed the Gukurahundi massacres, considered as a brutal crackdown on opposition supporters that claimed thousands of lives in the Matabeleland and Midlands provinces of Zimbabwe (The Zimbabwean, 2018; Allison, 2017). Can such a person be regarded as fit for leadership in terms of the African spirit of Unhu/Ubuntu? Zimbabweans will soon learn grave lessons for their naïve celebrations of the unconstitutional ascent to power of a "crocodile".

The truth about the ouster of Mr Robert Mugabe is that Africa is still entrapped in the colonial emperor's mouth (Warikandwa *et al*,

2017). There is a sickening belief to the effect that for Africa to develop it needs the west and Asia, as it is incapable of developing on its own terms (Frimpong-Boateng, 2012; Fourie, 2011). As such, any African leaders who seek to inculcate the spirit of self-reliance amongst Africans must be eradicated. Examples of Thomas Sankara, Patrice Lumumba and Mr Robert Mugabe himself come to the fore. It is interesting to observe that Mr Emmerson Mnangagwa's solution to growing the Zimbabwean economy is reversing the indigenisation policies of Mr Robert Mugabe (Oliphant & Thornycroft, 2017). Instead of growing infant industries and adding value to the country's raw materials extracted in the mining and agriculture sectors, Mr Mnangagwa believes attracting Foreign Direct Investment to exploit the country's natural resources will grow the country's economy (Chronicle, 2017; Makichi, 2018). Mr Emmerson Mnangagwa is in principle facilitating the theft of African resources and the exploitation of African labour. As such, it is trite to conclude that Mr Emmerson Mnangagwa rose to power to facilitate the theft of African materialities (Nhemachena *et al*, 2017). Mathew Davies, the Africa Business Report editor has identified five ways of reviving the Zimbabwean economy after Mugabe:

... injection of hard currency as Zimbabwe 'has not had a currency of its own since 2009, after hyperinflation killed off the old Zimbabwean dollar'; the need to dump damaging policies and neutralising corruption. In this regard, the Indigenisation and Economic Empowerment Act (IEEA) signed into law in 2009 and which placed 51% of companies into the hands of black Zimbabweans, has forced many companies to close down. In fact, 'much of the farmland that was seized from white farmers ended up in the hands of army generals and the political elite; need to negotiate with foreign lenders, especially that the country has been in default on \$9 billion for about 20 years; need to create a better environment for unemployment reduction and attraction of the Diaspora to return home. Unemployment is estimated at 90% while about 3 million of the total population of 16.15 million live abroad; and the need to create a Zimbabwean national currency. Zimbabwe had an average GDP per capita of USD 1,070.98 in the period 1960-2016. In 2016 alone, the per

capita income was put at USD 908.80 by some observers. The highest per capita since 1960 was USD 1342.50 in 1998 while the lowest per capita was recorded in 2008. As noted by the International Monetary Fund World Economic Outlook in October 2017, Zimbabwe had a per capita income of USD 1,137 in 2015, USD 1,112 in 2016, and USD 1,150 as at October 2017. The per capita income appears to be witnessing growth and has to be sustained (Davies, 2017).

Interestingly Mr Robert Mugabe presided over the period when per capita income appeared to be growing. This suggests that his economic blue print was beginning to bear fruit. Like Sankara, Mr Robert Mugabe's cardinal sin was to emancipate the Africans. What new democracy or economic growth are Zimbabweans going to witness thereof as suggested by Mr Emmerson Mnangagwa? It is void of Unhu/Ubuntu to give Zimbabweans' natural resources to western and Asian investors with little or no benefits accruing to the ordinary people. The African Mining Vision could offer guidance to those who think the western and Asia are Africa's panacea to their socio-economic challenges. The International Study Group Report (ISG) has indicated that mining in Africa still exhibits features that have changed little since colonial times (ISG, 2007-2008). Just as under colonialism, the extraction industry is characterised by enclaves of mining activity with very weak links to local economies (The Africa Mining Vision, 2009). Foreign investors in the mining sector import most of their inputs and repatriate all their profits. False pictures are given of how much African countries benefit from the foreign investors. Institutions such as the World Bank promote the notion of it being economically viable for foreign investors to exploit natural resources in Africa and not African governments themselves (Ibid). In fact, the World Bank promotes the reduced state participation in mining enterprises (Ibid). This approach has realised little in the way of socio-economic development for African countries. In fact, African countries are being asked to lower their regulatory standards in order to attract the so-called "much needed" foreign investors (Ibid). Africa does not need captured leaders who depose constitutionally elected leaders so that they can hand over our countries to western and Asian nations. We must take responsibility

for our development like pre-colonial African societies. The military operation was not meant to “Restore Legacy” but to mortgage Zimbabweans’ legacy to western countries and the Chinese. This approach is devoid of Unhu/Ubuntu and should therefore be unconstitutional. Unhu/Ubuntu should resonate with constitutionalism if constitutions are drafted based on public interest.

Conclusion

The African values which manifest themselves in Unhu/Ubuntu are in consonance with the values of the Constitution generally and those of the Bill of Rights in particular. The human rights violations and indignities of the past have not served legitimacy and respect for Zimbabwean law well. Quite obviously, the complete dignification of Zimbabwean law and jurisprudence would require considerable realignment of the present state of our African value systems. That way, coups such as the one, which took place in Zimbabwe, will be regarded as being contrary to our African value systems and therefore unconstitutional. We will thus have to be ingenious in finding and or creating law reform programmes, methods, approaches and strategies that will enhance adaptation to Unhu/Ubuntu values. The values of Unhu/Ubuntu, if consciously harnessed can become central to a process of harmonising all existing legal values and practices with the Constitution. Ubuntu can therefore become central to a new Zimbabwean jurisprudence and to the revival of sustainable African values as part of the broader process of the African renaissance. Organisations such as the AU will now be seen to act in a manner that does not condone unconstitutional removal of presidents but in a manner that espouses constitutionality. A lot still needs to be done in this regard. Africa must decolonise its legal institutions and its laws and work towards a moral and collective pursuit of their society’s best interests. Importing western notions of individualism at the expense of the common good of all is a recipe for disaster. Africa cannot afford any more coups, which undermine the African development agenda.

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Right from the enslavement era through to the colonial and contemporary eras, Africans have been denied their human essence – portrayed as indistinct from animals or beasts for imperial burdens, Africans have been historically dispossessed and exploited. Postulating the theory of global jurisprudential apartheid, the book accounts for biases in various legal systems, norms, values and conventions that bind Africans while affording impunity to Western states. Drawing on contemporary notions of animism, transhumanism, posthumanism and science and technology studies, the book critically interrogates the possibility of a jurisprudence of anticipation which is attentive to the emergent New World Order that engineers ‘human beings to become nonhumans’ while ‘nonhumans become humans’. Connecting discourses on decoloniality with jurisprudence in the areas of family law, environment, indigenisation, property, migration, constitutionalism, employment and labour law, commercial law and Ubuntu, the book also juggles with emergent issues around Earth Jurisprudence, ecocentrism, wild law, rights of nature, Earth Court and Earth Tribunal. Arguing for decoloniality that attends to global jurisprudential apartheid., this tome is handy for legal scholars and practitioners, social scientists, civil society organisations, policy makers and researchers interested in transformation, decoloniality and Pan-Africanism.

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